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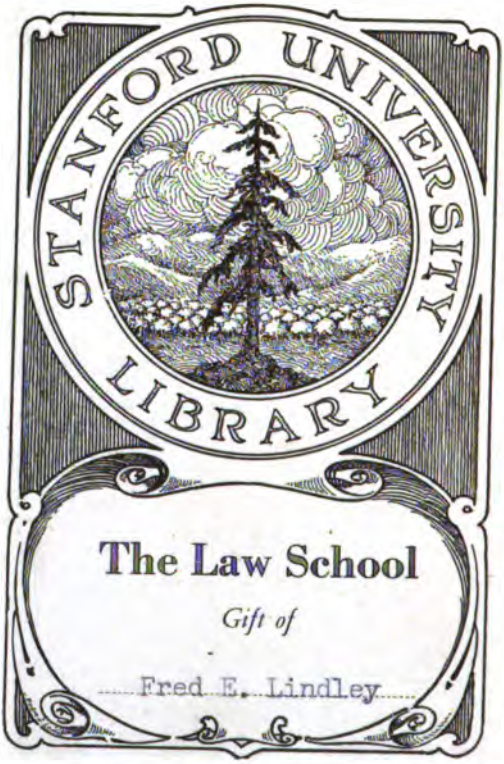

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TREATISE ON WILLS

BY

THOMAS JARMAN, ESQ.,

IN THREE VOLUMES.

VOLUME III.

FIFTH AMERICAN, FROM THE FOURTH LONDON EDITION, WITH NOTES AND REFERENCES TO AMERICAN DECISIONS.

BY

JOSEPH F. RANDOLPH AND WILLIAM TALCOTT

OF THE NEW JERSEY BAR.

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HENRY SWEET.

3 Chancery Lane, London W. C., March 2d, 1881

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636. To a class living at a stated time or their issue.
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655. to minority of legatees rather than to lifetime of tenant for life.
656. to period of vesting.

658. Word "payable" occurring in gift over, whether it refers to majority or the period of distribution.
659. referred to majority, not to period of distribution.
661. period of distribution.
majority.
662. implied, and referred to majority.
Distinction where the issue of the legatee are expressly provided for.
666. Result of the cases.
667. Construction not varied by tenant for life dying before majority of legatee.
Where no time fixed for payment, "payable" refers to period of distribution.
So under gift to such as survive tenant for life, notwithstanding time fixed for payment.
668. Where no prior life estate, and no time fixed for payment, time fixed, but legatee predeceases testator.
"Entitled in possession," &c.
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670. Construction of gift over on death before "vesting" of two estates differently devised.
671. Death before "entitled," held to refer to the interest.
672. possession.
Gift over on death before "receiving" construed receivable when the will points out a time for payment.
674. When referred to end of year after testator's death.
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675. Inquiry rejected.
676. what *might* have been received, rejected as impracticable.
677. Lord Eldon's observations; first, as to the construction; second, as to the inquiry.
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679. The gift over upheld.
680. Effect where part has been received and part not.
681. Gift over of the legacy or of the unreceived part, upheld.
682. Similar gift over held void.
683. Gift over without *leaving* children, read without *having* children.
685. *any issue*, "*leaving*" read "*having had.*"
686. "*Leaving*" not construed "*having had*" if prior gift to children is contingent.
687. But if one child survives parent, all will take, unless excluded by context.

CHAPTER L.

EFFECT OF FAILURE OF A PRIOR GIFT ON AN ULTERIOR EXECUTORY OR SUBSTITUTED GIFT OF THE SAME SUBJECT; ALSO, THE CONVERSE CASE.

689. Effect upon executory gift of failure of prior gift.
690. Failure of prior gift held to let in ulterior gift.

691. Gift over, in case there be but one child, extended by implication to event of there not being any.
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THE

LAW WITH RESPECT TO WILLS.

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*CHAPTER XXXII.

JOINT TENANCY, AND TENANCY IN COMMON.

I. *Joint Tenancy, Tenancies by Entireties, and Tenancy in Common.* | II. *What Words create a Tenancy in Common.*
III. *Lapse and other Miscellaneous Questions.*

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1. Under a devise or bequest to a plurality of persons concurrently, it becomes necessary to consider whether they take joint or several interests; and that question derives its importance mainly from the fact, that survivorship is incidental to a joint tenancy, but not to a tenancy in common. (*a*) [1]

Joint tenancy and tenancy in common.

(*a*) Any joint tenant may, however, by his own conveyance sever the tenancy as to his own share, and consequently destroy the *jus accrescendi* between himself and his companions. [If a woman joint tenant of freehold or leasehold land (May *v.* Hook, Co. Lit. 246 a, n. (1)) or of reversionary interest in personalty (In re Barton's Will, 10 Hare 12; Armstrong *v.* Armstrong, L. R., 7 Eq. 518) marries, this is no severance: *secus* as to chattels personal in possession, Bracebridge *v.* Cooke, Plowd. 416.]

1. The rule has been changed by statute in many states, so that a devise to two or more persons without expressed intention to make them joint tenants, creates a tenancy in common: Illinois (Rev. Stats. 1877, ch. 30, § 5); Iowa (Code 1873, § 1939); Maine (Rev. Stats. 1871, ch. 73, § 7); Maryland (Code 1860, Art. 49, § 12); Massachusetts (Gen. Stats., ch. 89, § 13); Michigan (Comp. L. 1872, § 4111); Minnesota (Stats. at Large 1873, ch. 32, § 44); Mississippi (Rev. Code 1871, § 2301); New Hampshire (Gen. L. 1878, ch. 135, § 14); New Jersey (1 Rev. Stats. 1877, p. 167); New York (1 Rev. Stats. 727, § 44); Rhode Island (Gen. Stats., ch. 161, § 1); Ver-

Devisees joint tenants, when.

A devise to two or more persons simply, it has been long settled, makes the devisees joint tenants; (*b*) but it should be observed that where the objects of the devise are husband and wife, who are in law regarded as one person, they take not as joint tenants, but *by entireties;*[2] the consequence of which is, that neither can, by his or her own separate conveyance, affect the estate of the other. (*c*) [The same rules have been held applicable to personalty. (*d*)]

Husband and wife tenants by *entireties*, when;

—and take the share of *one* only;

Another consequence of this unity of person in husband and wife is, that where a gift is made to them concurrently with other persons, they are considered as, and take the share

mont (Gen. Stats. 1870, ch. 64, § 2); while other states have accomplished the same object by abolishing the right of survivorship between joint tenants: Indiana (2 Rev. Stats. 1876, p. 491); Kentucky (Gen. Stats. 1877, ch. 63, § 13); North Carolina (Rev. Stats. 1873, ch. 42, § 2); Pennsylvania (1812, Purdon's Dig. 815); South Carolina (Rev. Stats. 1873, ch. 85, § 9); Tennessee (Code 1858, § 2010); West Virginia (Code 1868, ch. 71, § 18.) As to the effect of the statutory provisions on this subject, see Burghart *v.* Turner, 12 Pick. 534; Eliot *v.* Carter, Id. 436; Gilman *v.* Morrill, 8 Vt. 77; Den *v.* Van Riper, 1 Harr. (N. J.) 7; Boston Franklinite Co. *v.* Condit, 4 C. E. Gr. (N. J.) 394; but it seems not to apply to personal property given to two or more without words of severance, Gilbert *v.* Richards, 7 Vt. 203; 2 Kent (5th ed.) 351; Yard's Appeal, 86 Penna. St. 125. See also Wms. Ex'rs (6th Am. ed.) 1573. By the statute of descent, children take as joint tenants in Massachusetts, Parker *v.* Knowlton, 14 Pick. 244.

[(*b*) A limitation to two persons and the survivor of them, and the heirs of such survivor, does not create a joint tenancy; it gives a contingent remainder to the survivor, Vick *v.* Edwards, 3 P. W. 372; In re Harrison, 3 Anst. 836. But if the gift were to two and the survivor, and *their* heirs, they would probably be held to take jointly, Oakeley *v.* Young, 2 Eq. Cas. Ab. 537, pl. 6; Doe d. Young *v.* Sotheron, 2 B. & Ad. 628.]

2. Davis *v.* Clark, 26 Ind. 424; Arnold *v.* Arnold, 30 Ind. 305; Simpson *v.* Pearson, 31 Ind. 1; Jones *v.* Chandler, 40 Ind. 588; Fox *v.* Fletcher, 8 Mass. 274; Draper *v.* Jackson, 16 Mass. 480; French *v.* Mehan, 56 Penna. St. 286; Thomas *v.* De Baum, 1 McCart. 37; McDermott *v.* French, 2 McCart. 78; Berrigan *v.* Fleming, 2 B. J. Lea (Tenn.) 271. "The act of the legislature for converting estates in joint tenancy into tenancies in common does not extend to estates thus held by husband and wife in entireties," Green, C., in Thomas *v.* De Baum, 1 McCart. 37, 40; see also Den *v.* Hardenburgh, 5 Halst. 42; Jackson *v.* Stevens, 16 Johns. 115; McDermott *v.* French, 2 McCart. 78. So, too, in Massachusetts, Shaw *v.* Hearsay, 5 Mass. 521; Fox *v.* Fletcher, *ubi supra;* Draper *v.* Jackson, *ubi supra;* Varnum *v.* Abbott, 12 Mass. 474; and in Maryland, Marburg *v.* Cole, 49 Md. 402. But an estate to A and his wife for their lives and the life of the survivor, and then "to their lawful heirs," is a joint tenancy, Auman *v.* Auman, 21 Penna. St. 343; Criswell's Appeal, 41 Id. 288.

(*c*) Doe d. Freestone *v.* Parratt, 5 T. R. 652; [Back *v.* Andrew, 2 Vern. 120, Pre. Ch. 1.

(*d*) Atcheson *v.* Atcheson, 11 Beav. 485; Moffat *v.* Burnie, 18 Beav. 211.]

of, *one* only. Thus, if property be given to A, and B his wife, and C (a third person), A and B will take one moiety, and C the other, not A and B two-thirds, and C the remaining third. (*e*)

*[It was said by Popham, C. J., that if the gift were to husband and wife and another *as tenants in common*, they would each take a third part; (*f*) and so thought Sir J. Romilly, M. R., (*g*) and apparently Sir L. Shadwell also. (*h*) But in Warrington *v.* Warrington, (*i*) Sir J. Wigram, V. C., rejected the distinction, thinking that the quantity which the husband and wife took as between them and third parties, was a different question from how they took as between each other. And in In re Wylde (*j*) they were held entitled to a moiety only between them, although in another part of the will an equal legacy was given to each of the three persons, husband, wife, and stranger. Some nice distinctions depending upon the husband and wife being named *after* the other legatee, the omission of the word "and" before the husband's name, and the near relationship to the testator of both husband and wife, and not of one of them only, have been thought sufficient in some cases (*k*) to authorize a departure from this rule, so as to treat the husband and wife as each entitled to share equally with the other legatees. How far such distinctions can be relied upon may be thought doubtful. (*l*)]

—although the bequest create a tenancy in common.

But an exception to the rule, that a devise to two or more creates a joint tenancy, exists in certain cases where the estate conferred by the devise is an *estate tail:* for where lands are devised to several persons and the heirs of their bodies, who are not husband and wife *de facto*, or capable of becoming such *de jure*, either from their being of the same sex, or standing related within the prohibited degrees, inasmuch as the devisees cannot, either in fact or in contemplation of law (as the case may be), have common heirs of their bodies, they are "by necessity of reason," as Littleton says, "tenants in common in respect of the

Devisees in tail tenants in common, when;

—though made joint tenants of the freehold.

(*e*) See Lewin *v.* Cox, Moore 558, pl. 759; Anon., Skinn. 182; Co. Lit. 187 a; [Bricker *v.* Whatley, 1 Vern. 233.] Would it make any difference, as regards this doctrine, that the wife was described without reference to her conjugal character? It is conceived not. [The doctrine is peculiar to English law, Dias *v.* De Livera, 5 App. Cas. 123.

(*f*) Lewin *v.* Cox, Moore 558.

(*g*) Marchant *v.* Cragg, 31 Beav. 398.

(*h*) Paine *v.* Wagner, 12 Sim. 184.

(*i*) 2 Hare 54.

(*j*) 2 D., M. & G. 724.

(*k*) Warrington *v.* Warrington, 2 Hare 54; Paine *v.* Wagner, 12 Sim. 184. See Bricker *v.* Whatley, 1 Vern. 233.

(*l*) Gordon *v.* Whieldon, 11 Beav. 170.]

estate tail." (*m*) As this reason, however, applies only to the inheritance in tail, and not to the immediate freehold, the devisees are joint tenants *for life*, with several inheritances in tail, so that on the death of one of them, whether he leave issue or not, the surviving devisee becomes entitled for life to his share *under the joint tenancy, (*n*) and the inheritance in tail descends to the issue (if any) subject to such estate for life. (*o*)

Devise to "first, second, &c., sons," they take successively.

[Nor are those cases within the rule where the devise is to the first, second, and other sons of A in tail, for this form of gift is held to imply succession. (*p*)]

Joint tenancy in chattels;

A bequest of chattels, whether real or personal, to a plurality of persons, unaccompanied by any explanatory words, confers a joint, not a several interest, (*q*) and that whether the gift be by way of trust or not; (*r*) [3] and, notwithstanding the disposition of the courts of late years to favor tenancies in common, the same rule is now established as to money legacies, and residuary bequests, (*s*) in opposition to some early authorities, (*t*) and the doubts thrown out by Lord Thurlow in

—in pecuniary legacies and residues of personalty.

(*m*) Co. Lit. 184 a. See also Huntley's Case, Dyer 326 a; Cook *v.* Cook, 2 Vern. 545; Pery *v.* White, Cowp. 777; [Forrest *v.* Whiteway, 3 Exch. 367; De Windt *v.* De Windt, L. R., 1 H. L. 87.]

(*n*) Wilkinson *v.* Spearman, in D. P., cit. Cook *v.* Cook, 2 Vern. 545, and Cray *v.* Willis, 2 P. W. 529. See also Co. Lit. 182 a; [Edwards *v.* Champion, 3 D., M. & G. 202; Tufnell *v.* Borrell, L. R., 20 Eq. 194.]

(*o*) Sometimes a result of this kind is produced by the terms of the will, of which an example is afforded by Doe d. Littlewood *v.* Green, 4 M. & Wels. 229, where a testator devised his real estates to his nieces E. and J., equally between them, to take as joint tenants, and their several and respective heirs and assigns forever; and it was held that they took estates as joint tenants for life, with remainder, expectant on the decease of the survivor, to them as tenants in common. [See also Folkes *v.* Western, 9 Ves. 456; Ex parte Tanner, 20 Beav. 374; Haddelsey *v.* Adams, 22 Id. 266.

(*p*) Cradock *v.* Cradock, 4 Jur. (N. S.) 626, citing Lewis d. Ormond *v.* Waters, 6 East 336. In the latter case it was said it would be different if the gift were to "all and every the sons;" and see Surtees *v.* Surtees, L. R., 12 Eq. 400, acc. In Allgood *v.* Blake, L. R., 7 Ex. 355, 8 Ex. 166, the words "all and every the *issue*" were construed by the context to be words of limitation equivalent to "heirs of the body."

(*q*) Lit., § 381;] Shore *v.* Billingsley, 1 Vern. 482; Willing *v.* Baine, 3 P. W. 113; Barnes *v.* Allen, 1 B. C. C. 181.

(*r*) Aston *v.* Smallman, 2 Vern. 556; [Bustard *v.* Saunders, 7 Beav. 92.]

3. McGuire *v.* Evans, 5 Ired. Eq. 269; Field *v.* Eaton, 1 Dev. Eq. 283; Noe *v.* Miller, 4 Stew. (N. J.) 234.

(*s*) 1 Vern. 482; 2 P. W. 347, 529; 3 Id. 113; 4 B. C. C. 15; 3 Ves. 629, 632; 6 Ves. 129; 9 Ves. 197; [2 Y. & C. C. C. 372.]

(*t*) Cox *v.* Quantoch, 1 Ch. Cas. 238; Sanders *v.* Ballard, 3 Ch. Rep. 214; 2 P. W. 489; [Taylor *v.* Shore, T. Jones 162.]

Perkins *v.* Baynton. (*u*) It is observable, however, that in another case (*v*) he relied wholly upon the words of severance, as constituting the legatees of a money legacy tenants in common; from which Lord Alvanley inferred that he had never made the observations imputed to him; (*x*) but Lord Eldon has referred to them in a manner which leaves no doubt of the fact, although he has placed the general question beyond controversy, by stating his own opinion generally to be, "that a simple bequest of a legacy or a residue of personal property to A and B, without more, is a joint tenancy." (*y*)

Rule applies to gifts to children as a class

The rule that a gift to two or more simply creates a joint *tenancy, applies indiscriminately to gifts to individuals and gifts to classes, (*z*) including, it should seem, dispositions in favor of children, notwithstanding Lord Hardwicke's objection in Rigden *v.* Vallier (*a*) to apply the construction to provisions by a father for his children, on account of its subjecting them to be defeated by survivorship. [It also applies to a gift to children in remainder, or *quasi* remainder, after a prior estate for life. (*b*) Such a gift] it has been seen vests the property in such of the children as are living at the death of the testator, with a liability to be divested *pro tanto* in favor of objects [coming into existence during the prior life estate, each of whom takes a vested interest at his own birth, and, consequently, at a different time from the rest. In a conveyance at common law such a limitation, according to Lord Coke, creates a tenancy in common. Thus,] "if lands be demised for life, the remainder to the right heirs of J. S. and J. N., J. S. hath issue, and dieth, and after J. N. hath

—although members of the class may become entitled at different times:

(*u*) 1 B. C. C. 118. Warner *v.* Hone, 1 Eq. Cas. Ab. 292, pl. 10, cited by his lordship, does not apply, as it was the bequest of a leasehold house, and there were words of severance.

(*v*) Jolliffe *v.* East, 3 B. C. C. 25.

(*x*) See Morley *v.* Bird, 3 Ves. 630.

(*y*) Crooke *v.* De Vandes, 9 Ves. 204.

[(*z*) "*Family*," Wood *v.* Wood, 3 Hare 65; Gregory *v.* Smith, 9 Hare 708. "Next of kin," Withy *v.* Mangles, 4 Beav. 358; Baker *v.* Gibson, 12 Beav. 101. "Issue," Hill *v.* Nalder, 17 Jur. 224; Williams *v.* Jekyll, 2 Ves. 681; In re Corlass, 45 L. J., Ch. 119, 1 Ch. D. 460.]

(*a*) 2 Ves. 258.

[(*b*) Oates d. Hatterley *v.* Jackson, 2 Str. 1172; Mence *v.* Bagster, 4 De G. & S. 162; Kenworthy *v.* Ward, 11 Hare 196; Williams *v.* Hensman, 1 J. & H. 546; M'Gregor *v.* M'Gregor, 1 D., F. & J. 63; Ruck *v.* Barwise, 2 Dr. & Sm. 510; In re Corlass, 45 L. J., Ch. 119, 1 Ch. D. 460 (issue); Amies *v.* Skillern, 14 Sim. 428, also is generally cited as in point; but if (as the V. C. held) the fund there vested in all the children at the same moment, *i. e.*, at the death of the tenant for life, the question did not arise: and so in Bridge *v.* Yates, 12 Sim. 645, and Noble *v.* Stow, 29 Beav. 409.]

issue, and dieth, the issues are not joint tenants, because the one moiety vested at one time and the other moiety vested at another time." (c) But his doctrine has been usually considered as not applying to conveyances to uses (d) or to wills, a distinction [thus explained by Sir W. P. Wood, V. C.: "Under a limitation in remainder of a use to children, they are not, as they come *in esse*, let in with other persons who have not the whole interest; but the whole body always hold the whole interest, letting in other members of the body as they come *in esse*. But at common law, when the interest has once vested in remainder, the interest must vest either wholly or in a moiety; it must be either the one or the other, and there is no mode, as there is in a use, of getting the entirety into the remainderman, and then taking it out of him afterwards by the springing use as soon as the *cestui que use* comes *in esse*. Therefore, you have at once and for all to ascertain whether he would take the *whole or a moiety: the intent being that he should take a moiety and not the whole, if he took the whole it would be against the intent. The result is, he takes a moiety and holds it in common with the donee of the other moiety. A devise stands on the same footing in this respect as a conveyance to uses; and in the case of a trust a court of equity will follow what is said to be the reason of the rule on uses and devises, viz., the intent; and the intent, as appearing by the words, is to create a joint tenancy." (e)

Two examples will sufficiently illustrate the rule as applied to wills. Thus, in Oates d. Hatterley *v.* Jackson, (f) where lands were devised to A for life, remainder to B and her children and their heirs; it was held that B took as joint tenant with her children, and that it was no objection that the estates might commence at different times. So in M'Gregor *v.* M'Gregor, (g) where a testator gave his personal, and the money to arise by sale of his real, estate in trust to pay the income to his children living when the youngest of them should attain twenty-one in equal shares for their respective lives, and after the death of any of them, then as to an equal portion of the fund proportionate to the number of children then living, in trust for the issue of the child so dying: it was held that the issue (construed children) took as joint tenants. And where the gift, after a life interest to A, was to *all and*

(c) Co. Lit. 188 a.

[(d) Matthews *v.* Temple, Comb. 467, 1 Ld. Raym. 311, *nom.* Earl of Sussex *v.* Temple, Stratton *v.* Best, 2 B. C. C. 233; Doe d. Allen *v.* Ironmonger, 3 East 533; Sugd. Gilb. Uses 134, 135 and n. (10).

(e) 11 Hare 196. See Samme's Case, 13 Rep. 55; Shelley's Case, 1 Rep. 101.

(f) 2 Str. 1172.

(g) 1 D., F. & J. 63.

every her child and children, and his, her and their executors, &c., the same construction prevailed. (*h*)

But where the remainder is limited to vest in such only of the class as attain twenty-one, then of necessity a tenancy in common is created; for there may be several children, some of age, others not, and those who have contingent interests cannot take as joint tenants with those who have vested interests, since there is no mutuality of survivorship. (*i*)

—but not if the gift vests in them at different ages.

But where a fund is given to several or their issue share and share alike, or to be divided among such as may be living at a stated time and the issue of such as may then be dead, the issue (in either case) to take their parents' share, the general rule is to read the words of severance as affecting the interests of the parents only. Thus, in Bridge *v.* Yates, (*k*) where a testator gave *the produce of his real and personal estate in trust for his wife for life, and after her death "to be equally divided among his children who should be then living, and the issue of such of them as should be then dead, such issue taking only" the deceased parent's share; it was held that the terms of severance referred only to the children, and that the issue of a deceased child, though taking in common with the surviving children, yet *inter se* were joint tenants of their parent's share. It is otherwise if the words of severance are repeated and would be tautologous unless applied to the issue. (*l*) So, accruing shares will not be held in common merely because that quality is attached to the original shares. (*m*) Neither will words importing a tenancy in common in one bequest be extended by implication to another bequest which is connected with the former by the term "also." (*n*)

Tenancy in common not implied in substituted gift;

—nor in gift of accruing shares:

—nor from another gift connected by the word "also."

(*h*) Morgan *v.* Britten, L. R., 13 Eq. 28. See also Surtees *v.* Surtees, L. R., 12 Eq. 400, 406.

(*i*) Woodgate *v.* Unwin, 4 Sim. 129, as explained 1 D., F. & J. 74; see also Hand *v.* North, 33 L. J., Ch. 556 (immediate gift to two by name "as they come of age"); In re Jeaffreson's Trusts, L. R., 2 Eq. 282, 283.

(*k*) 12 Sim. 645; see also Amies *v.* Skillern, 14 Sim. 428; Penny *v.* Clarke, 1 D., F. & J. 425, per Turner, L. J.; Leak *v.* Macdowall, 32 Beav. 28; Coe *v.* Bigg, 1 N. R. 536; Lanphier *v.* Buck, 2 Dr. & Sm. 499; Heasman *v.* Pearse, L. R., 11 Eq. 522, 7 Ch. 275. But see Crosthwaite *v.* Dean, W. N. 1879, p. 93.

(*l*) Lyon *v.* Coward, 15 Sim. 287: and see Att.-Gen. *v.* Fletcher, L. R., 13 Eq. 128; Hodges *v.* Grant, L. R., 4 Eq. 140.

(*m*) Webster's Case, 3 Leo. 19, pl. 45; Jones *v.* Hall, 16 Sim. 500; Leigh *v.* Mosley, 14 Beav. 605.

(*n*) Cookson *v.* Bingham, 17 Beav. 262; and see cases cited vol. I., p. *499.

Reference should here be made to those cases, more fully discussed hereafter, (o) where a gift to A and his children has, on slight grounds, been held not to create a joint tenancy in parent and children, which is its primary effect, but to make A tenant for life, with remainder to his children. It has been already seen that where one devises his lands to A in fee, and in another part of his will devises the same lands to B in fee, the weight of authority inclines to a joint tenancy between A and B. (p)]

Whether, under gift to A and his children, they take concurrently.

Distinct gifts of same lands to different persons, create a joint tenancy.

It should be observed, that, in carrying into effect executory trusts, the courts will not make the objects joint tenants, without a positive and unequivocal expression of intention to that effect. Thus, where (q) trustees were directed, as soon as the testator's three daughters attained their respective ages of twenty-one, to convey to them and the heirs of their bodies and their heirs as joint tenants, and, for want of such issue, over; Lord *Hardwicke decreed that the conveyance should be made to the daughters as tenants in common in tail, with cross-remainders, which he thought was the best mode of giving effect to these words. [And in Alloway v. Alloway, (r) where £6000 having been given to and among such children as A should appoint, A made her will thus: "Robert give three of the £6000 I wish to have given to the two elder girls;" on the ground that this was a direction to Robert to deliver to each of the two appointees her separate share, it was held that they took in common.]

Executory trusts.

II.—The question next to be considered is, what words will operate to create a tenancy in common. It may be stated generally, that all expressions importing division by equal or unequal (s) shares, or referring to the devisees as owners of respective or distinct interests, and even words simply denoting

What words create a tenancy in common.

(o) See Newill v. Newill, L. R., 7 Ch. 253, and other cases *post* ch. XXXVIII.

(p) *Ante* vol. I., p. *476.]

(q) Marryat v. Townley, 1 Ves. 102. [See also Synge v. Hales, 2 Ba. & Be. 499; Taggart v. Taggart, 1 Sch. & Lef. 84; Owen v. Penny, 14 Jur. 359; Head v. Randall, 2 Y. & C. C. C. 231; Mayn v. Mayn, L. R., 5 Eq. 150. But see White v. Briggs, 2 Phill. 585; and a trust to settle or convey (De Havilland v. De Saumarez, 14 W. R. 118; In re Bellasis' Trusts, L. R., 12 Eq. 218) or that property shall "be left" (Mence v. Bagster, 4 De G. & S. 162; Noble v. Stow, 29 Beav. 409) is not necessarily executory. See further on this subject, *post* ch. XXXVI., § 2.

(r) 4 Dr. & War. 380. See Mathews v. Bowman, 3 Anst. 727.]

(s) Gibbon v. Warner, 14 Vin. Ab. 484, 485.

equality, will have this effect.[4] Thus, it has been long settled that the words "equally to be divided," (*t*) [or "to be divided,"] (*u*) will create a tenancy in common; and so, of course, will a direction that the subject of gift shall "be distributed in joint and equal proportions." (*x*)

"To be divided."

"In joint and equal proportions."

4. The following words have been held to create a tenancy in common: "to be equally divided between them," Griswold v. Johnson, 5 Conn. 363; Briscoe v. McGee, 2 J. J. Marsh. 370; Partridge v. Colgate, 3 Harr. & McH. 339; Whiting v. Cook, 8 Allen 63; Walker v. Dewing, 8 Pick. 520; Emerson v. Cutler, 14 Pick. 108; Parker v. Knowlton, 14 Pick. 244; Bender's Appeal, 3 Grant Cas. 210; Evans v. Brittain, 3 Serg. & R. 135; Allison v. Kurtz, 2 Watts 185; Drayton v. Drayton, 1 Desaus. 329; "in equal shares," Dunn v. Bryan, 38 Ga. 154; Roberts v. Brinker, 4 Dana 573; Gilpin v. Hollingsworth, 3 Md. 190; Westcott v. Cady, 5 Johns. Ch. 334; "share and share alike," Irwin v. Dunwoody, 17 Serg. & R. 61; Bunch v. Hurst, 3 Desaus. 288; "as a common stock," Dickson v. Dickson, 70 N. C. 487; "as joint stock to be equally divided," Weir v. Humphries, 4 Ired. Eq. 264; "to share alike," Witmer v. Ebersole, 5 Penna. St. 458; "to A, B and C, *her part* to her children," Martin v. Smith, 5 Binn. 16. In Emerson v. Cutler, *ubi supra*, Shaw, C. J., says: "Whatever may have sometimes been held in regard to certain common law conveyances, it has ever been considered a settled rule in the construction of wills that where a testator gives to two or more property real or personal 'equally to be divided' or 'share and share alike' or 'in equal shares' or other equivalent expressions indicating that the objects of his bounty shall have their respective shares of the entire thing granted, this shall be deemed a tenancy in common and not a joint tenancy, unless there be other express provisions showing a clear intention of the testator that they shall take as joint tenants or that the survivor shall take the whole." Where the testator directs a division of his property between six children in equal parts, A's share to be invested and the income paid her for life, and on her death the principal paid to her children, A does not become a tenant in common with the others, and cannot maintain a suit for partition, Mead v. Jennings, 46 Mo. 91. A devise to several by name "and their heirs forever," creates a tenancy in common, Harrison v. Botts, 4 Bibb 420; McPherson v. McPherson, Addis. 327; (although the contrary was held in an early case (1801) in North Carolina, Campbell v. Heron, 1 Tayl. Repos. 199; as to a conveyance having like effect, see Galbraith v. Galbraith, 3 Serg. & R. 392; Bambaugh v. Bambaugh, 11 Serg. & R. 191;) or to several, "their heirs and assigns," Sacket v. Mallory, 1 Metc. 355; Dott v. Wilson, 1 Bay (S. C.) 457; or "to become the joint property of A and B, * * * not to be disposed of but pass to their heirs," Bond v. McNiff, 38 Super. Ct. N. Y. (J. & S.) 83; or "equally to A and his heirs and to B and his heirs, jointly to be enjoyed by them, their heirs and

(*t*) 3 Rep. 39 b; 1 Salk. 226; 1 Vern. 65; 2 Vern. 430; 1 Eq. Cas. Ab. 292, pl. 6; Moore 594; 1 P. W. 34, 14; 1 Ld. Raym. 6_2; 12 Mod. 296; 2 P. W. 280; 3 B. P. C. Toml. 104; 1 Wils. 165; [1 Ves. 13, 165; 1 Atk. 493, 494;] 3 B. C. C. 25; Id. 215; 1 D. & Ryl. 52; 5 B. & Ald. 464, 636.

[(*u*) Chapman v. Peat, 1 Ves. 542; Ackerman v. Burrows, 3 Ves. & B. 54.]

(*x*) Ettricke v. Ettricke, Amb. 656.

A devise or bequest to several persons, "equally amongst them," (y) or "equally," (z) [or "in equal moieties," (a) or "share and share alike,"] (b) or "respectively," (c) or with a limitation to their heirs "as they shall severally die," (d) [or "to *each* of their respective heirs," (e) or "to their executors and administrators respectively,"] (f) or to several "between," (g) [or "amongst" them, (h) or to "each" of several persons,] (i) *has been held, in contradiction of some of the very early cases, (k) to make the objects tenants in common. And a similar construction has been given (l) to a devise to several their heirs and assigns, "all to have part alike, and every of them to have as much as the other." 5 So, where (m) the devise was to A and B of lands, "to be enjoyed alike," Lord Mansfield held that they were tenants in common, considering that word as synonymous with *equally*.

"Equally."
"Respectively."
"Severally."
"Each of their respective heirs."
"Between."
"Amongst."
"Each" of several.
"All to have part alike," &c.

Again, where (n) A bequeathed a term of years to her two daugh-

assigns forever," Evans v. Brittain, 3 Serg. & R. 135. In Delaware, a devise to "A and B jointly, their heirs and assigns forever," is a tenancy in common, Davis v. Smith, 4 Harring. 68.

(y) Warner v. Hone, 1 Eq. Cas. Ab. 293, pl. 10.

(z) Lewen v. Dodd, Moore 558, pl. 759; Cro. El. 443, 695 (Lewen v. Cox); Denn v. Gaskin, Cowp. 657.

[(a) Harrison v. Foreman, 5 Ves. 206.

(b) Rudge v. Barker, Cas. temp. Talb. 124; Heathe v. Heathe, 2 Atk. 122; Perry v. Woods, 3 Ves. 204.]

(c) Torrett v. Frampton, Sty. 434; [Stephens v. Hide, Cas. temp. Talb. 27;] Folkes v. Western, 9 Ves. 456. See also Marryat v. Townley, 1 Ves. 102; [Hawes v. Hawes, Id. 13, 1 Wils. 165; Vanderplank v. King, 3 Hare 1.]

(d) Sheppard v. Gibbons, 2 Atk. 441.

[(e) Gordon v. Atkinson, 1 De G. & S. 478. Compare Ex parte Tanner, 20 Beav. 374.

(f) In re Moore's Trusts, 31 L. J., Ch. 368.]

(g) Lashbrook v. Cock, 2 Mer. 70; [Att.-Gen. v. Fletcher, L. R., 13 Eq. 128.

(h) Campbell v. Campbell, 4 B. C. C. 15; Richardson v. Richardson, 14 Sim. 526.

(i) Eales v. Cardigan, 9 Sim. 384; Hatton v. Finch, 4 Beav. 186.]

(k) See Lowen v. Bedd, 2 And. 17. [But from the correspondence in date (Mich. T. 37, 38 Eliz.) this seems to be the same case as Lewen v. Dodd, in C. B., Cro. Eliz. 443, in which latter report it appears that Anderson, C. J., (the reporter of Lowen v. Bedd,) and Walmsley, J., were for the joint tenancy, against Owen and Beaumont, JJ. In Toth. 143, is cited a case of Lowen v. Lowen, also apparently the same case, and held a tenancy in common.]

(l) Thorowgood v. Collins, Cro. Car. 75. See also Page v. Page, 2 P. W. 489.

5. Witmer v. Ebersole, 5 Penna. St. 458; Irwin v. Dunwoody, 17 Serg. & R. 61; Bunch v. Hurst, 3 Desaus. 288.

(m) Loveacres d. Mudge v. Blight, Cowp. 352.

(n) Kew v. Rouse, 1 Vern. 353, 1 Eq. Cas. Ab. 292, pl. 7. [See also Milward v. Milward, cited 2 Atk. 309.]

ters, they paying yearly to her son £25, by quarterly payments, viz., *each of them* £12 10s. yearly out of the rents of the premises, during his life, if the term so long continued; Jefferies, L. C., held this to be a tenancy in common, *the* £25 *being to be paid by the daughters in moieties.*

Charge upon the legatees in moieties.

In another case, (o) A bequeathed his personal estate to his sons R. and J., and provided that if J. should be desirous to be put out apprentice, a competent sum should be raised "in part of the *share*" to which he would become entitled; and Macdonald, C. B., held that the latter words were decisive of the testator's intention to create a tenancy in common. [Again, where by will residue was given to A and B, and by codicil the testator desired that C should "participate" with them, it was held they were all tenants in common, (p) and a gift to two, with survivorship as to one moiety, has been held to negative the general right of survivorship characteristic of a joint tenancy, and to create a tenancy in common.] (q).

Direction in respect of one legatee's "share."

The preceding cases evince the anxiety of later judges to give effect to the slightest expressions affording an argument in favor of a tenancy in common; an anxiety which has been dictated by the conviction that this species of interest is better adapted to answer the exigencies of families than a joint tenancy, of which the best quality is that the right of survivorship may, at the pleasure of either of the co-owners (if personally competent,) be defeated by a severance of the tenancy.

*This leaning to a tenancy in common was acknowledged in a case (r) where a testator bequeathed to A and B £10,000, to be equally divided between them when they should arrive at twenty-one years, and to carry interest until they should arrive at that age. It was contended that the fund was to be divided *at twenty-one*, the legatees in the meantime taking it jointly; and that, therefore, by the death of one under age, it survived to the other; but Lord Thurlow decided otherwise; observing that the court decrees a tenancy in common as much as it can.

Leaning in favor of tenancy in common.

[So where a testator bequeathed a sum to trustees in trust "to pay,

(o) Gnat v. Laurence, Wight. 395. [See also Ive v. King, 16 Beav. 46.

(p) Robertson v. Fraser, L. R., 6 Ch. 696.

(q) Paterson v. Rolland, 28 Beav. 347; Ryves v. Ryves, L. R., 11 Eq. 539.]

(r) Jolliffe v. East, 3 B. C. C. 25.

assign and *divide* the same equally between all the children" of his daughter, "if more than one as *joint tenants*, and if but one then to that one child;" (*s*) Sir J. Stuart, V. C., held that the children took as tenants in common, although the testator had elsewhere bequeathed the residue of his estate unto and equally between two of his grandchildren "as tenants in common."

However, in Barker *v.* Giles, (*t*) where a testator devised "to A. and B, and the survivor of them, and their heirs and assigns, to be equally divided between them, share and share alike," it was held that the words equally to be divided referred only to the heirs, and, therefore, that A and B were joint tenants for life, with several inheritances to them in common. But the terms of gift are not often capable of being thus split up, and words of survivorship will not generally be held to defeat the tenancy in common, but rather to point out a particular period for ascertaining who are to be the devisees; leaving such devisees, when ascertained, to take as tenants in common. (*u*)

To children of several parents "respectively."

In a gift to the children of several persons "respectively," the word may have the effect only of attributing to each parent his own children, and of causing the property to devolve *per stirpes;* the children taking *inter se* as joint tenants. (*x*)

Annuity to several in common "for their lives and the life of the survivor."

*When annuities are given to two or more persons in terms which constitute a tenancy in common, the interests of the annuitants will not be varied merely by reason of the annuities being given "for their lives and for the life of the survivor;" these words are sufficiently satisfied by their literal interpretation as fixing the duration of the annuities, and, therefore, upon the death of each annuitant his annuity will devolve upon

[(*s*) Booth *v.* Alington, 27 L. J., Ch. 117, 3 Jur. (N. S.) 835.

(*t*) 2 P. W. 280, 3 B. P. C. Toml. 104.

(*u*) Bindon *v.* Earl of Suffolk, 1 P. W. 96; Perry *v.* Woods, 3 Ves. 204; Russell *v.* Long, 4 Ves. 551; Smith *v.* Horlock, 7 Taunt. 129; Ashford *v.* Haines, 21 L. J., Ch. 496. But see Moore *v.* Cleghorn, 10 Beav. 423, as to which *qu.* Huddelsey *v.* Adams, 22 Id. 266. In Brown *v.* Oakshot, 24 Beav. 254, there was a devise of a term to trustees upon trust to pay certain annuities, and the surplus to A and B in equal shares, and subject thereto a devise to A and B in fee, and it was held they took the surplus rents during the term as tenants in common, but the fee as joint tenants.

(*x*) In re Hodgson's Trust, 1 K. & J. 178; Hobgen *v.* Neale, L. R., 11 Eq. 48. And see Davis *v.* Bennet, 31 L. J., Ch. 337 (where further words of severance created a tenancy in common): and cf. In re Moore's Trusts, Id. 368, *ante* p. *257.

his representative during the life of the survivor. (y) But where the annuity was given to *each* of two persons "for their lives, or the life of the longest liver of them, for their *or her* own absolute use and benefit," it was held that *reddendo singula singulis*, the two annuities were to be for the benefit of the annuitants during their joint lives; and after the death of either, then during the life of the other both were to be "for her own use and benefit."] (z)

Of course expressions which, standing alone, would create a tenancy in common, may be controlled and neutralized by the context: and such, it seems, is the effect of the testator's postponing the enjoyment of an ulterior devisee or legatee until the decease of the *survivor* of the several co-devisees or legatees for life, which, it is thought, demonstrates an intention that the property shall, in the meantime, devolve to the survivors under the *jus accrescendi* which is incidental to a joint tenancy.

Words creating a tenancy in common rejected by force of context.

Thus, in Armstrong *v.* Eldridge, (a) where a testator devised the residue of his real and personal estate to trustees, in trust to sell, and apply the interest from time to time to the use of his grandchildren F., C., R., and M., *equally between them share and share alike*, for and during their several and respective natural lives, *and after the decease of the survivor of them*, in trust to apply the principal to and among the children of his grandchildren: Lord Thurlow said that although the words "equally to be divided," and "share and share alike," were, in general, construed in a will to create a tenancy in common, yet where the context showed a joint tenancy to be intended, the words should be construed accordingly; and in this case the interest was to be divided among four while four were living, among *three while three were alive, and nothing was to go to the children while any of the mothers were living.

And the same construction has prevailed even where the ulterior devise was not, in terms, after the decease of the survivor, but after the decease or the deceases of the prior legatees; it being considered that the property is not to go over until the decease of all the legatees, though the words, especially in the latter case, might seem to admit of

(y) Jones *v.* Randall, 1 J. & W. 100; Eales *v.* Cardigan, 9 Sim. 384; Bryan *v.* Twigg, L. R., 3 Ch. 183, stated vol. I., p. *543.

(z) Hatton *v.* Finch, 4 Beav. 186.]

(a) 3 B. C. C. 215. See also Doe d. Calkin *v.* Tomkinson, 2 M. & Sel. 165; Cranswick *v.* Pearson, 31 Beav. 624, as to which see per Rolt, L. J., L. R., 3 Ch. 186.

being construed after the "respective" deceases, if the court had felt particularly anxious to avoid the rejection of the words creating a tenancy in common.

Thus, in Tuckerman *v.* Jeffries, (*b*) where the testator devised to A and B, to be equally divided between them during their natural lives, *and after the deceases of A and B* to the right heirs of A forever: it was held that they were joint tenants, notwithstanding the words "equally to be divided;" it being considered that the whole was to go over to the heirs of A at once on the decease of the survivor, not that they should take by moieties at several times.

"After decease of E. and G." read after decease of *survivor.*

So, in Pearce *v.* Edmeades, (*c*) where a testator bequeathed the residue of his estate to trustees, in trust to pay the interest dividends and produce thereof to his daughter M. for life, and after her decease unto and between her two children E. G. and G. G., during their *respective* lives *in equal shares; and from and after the decease of the said E. G. and G. G.*, upon further trust to pay or transfer and divide the same unto and between all and every the child or children, if more than one, of the said E. G. and G. G. in equal shares; and if but one then to such only child, and if there should be no child of the said E. G. and G. G. living at the time of their decease, or born in due time after the *death of the said G. G., then upon further trust for the testator's legal personal representatives. The testator and E. G. died, the latter leaving children, whereupon the entire income was claimed by G. G. as the only sur-

(*b*) 3 Bac. Ab. Joint Tenants, (F) 681 (6th ed.), [Holt 370, 11 Mod. 108–9. See also Stephens *v.* Hide, Cas. temp. Talb. 27; Malcolm *v.* Martin, 3 B. C. C. 50 (but as to which see cases *post* p. *263, n. (*f*)); Townley *v.* Bolton, 1 My. & K. 148; M'Dermott *v.* Wallace, 5 Beav. 142; Alt *v.* Gregory, 8 D., M. & G. 221; Begley *v.* Cook, 3 Drew. 662. See and cf. In re Drakeley's Estate, 19 Beav. 395. There will be no implied survivorship where such a gift over is preceded by separate gifts of distinct properties for life, Swan *v.* Holmes, 19 Beav. 471; Sarel *v.* Sarel, 23 Beav. 87; Lill *v.* Lill, Id. 446; Brown *v.* Jarvis, 2 D., F. & J. 168 (where the gift over was, "after the decease of every of them;") Stevens *v.* Pyle, 28 Beav. 388: nor, if there is no limitation expressly for the lives of the donees, but the gifts are still separate; in such case the interest passes to the respective representatives till the gift over takes effect, Bignold *v.* Giles, 4 Drew. 343. An express gift to the survivors in one event would seem to exclude an implied gift to *them* in the alternative event, Coates *v.* Hart, 32 Beav. 349. But if the share of one co-tenant for life is given (until the final gift over) to his children, if any; this leaves the implication in favor of survivors untouched if there are no children, Walmsley *v.* Foxhall, 1 D., J. & S. 605.]

(*c*) 3 Y. & C. 246; [Ashley *v.* Ashley, 6 Sim. 358.]

vivor; and Lord Abinger, C. B., held that he was entitled. "It has been settled (he said) by a series of decisions, that the words 'respectively,' and 'in equal shares,' when not controlled by other words in a will, shall be taken to indicate the nature of an estate or interest bequeathed, and shall constitute a tenancy in common. But when these words are combined with or followed by others which would make a tenancy in common inconsistent with the manifest design of the subsequent bequest of the testator, they may be taken to indicate, not the nature, but the proportion of the interest each party is to take. In the present case the bequest to G. G. and E. G. during their lives, is of the interest and dividends only of the residue of the testator's estate. The *corpus* of the residue is not to be divided or possessed by the legatees till after the decease both of G. G. and E. G.; and then it is to be divided amongst such of their children only as shall be living at the death of the survivor. It is clear, therefore, that the mass of the property is to be divided amongst the children who might survive both the parents, *per capita* and not *per stirpes*. This would be quite inconsistent with a tenancy in common of the parents. Again, the testator, by his care in pursuing this property through three generations, and bequeathing it, upon failure of these, to his then personal representatives, shows that he meant to die intestate of no part of it; but as the interest and dividends only are devised to his grandchildren G. G. and E. G., and nothing is devised to their children till the death of both, it would follow that if G. G. is not entitled to the whole interest and dividends accruing after the death of E. G. during his life, the portions of interest and dividends which she took in her lifetime would be undevised during the remainder of G. G.'s life."

Remark on preceding cases.

As in the three preceding cases no act had been done to sever the joint tenancy (if any) between the several devisees or legatees, it was not necessary to determine whether the effect of the will was to confer a joint interest, with its incidental right of survivorship, or to create a tenancy in common with an implied gift to the survivor for life. Indeed, no allusion is made to the latter point, except in Pearce *v.* Edmeades, and even there it does not appear to have formed the prevailing *ground of determination though perhaps less violence is done to the language of the will by implying a positive gift to the survivor than by rejecting the words of severance. (*d*)

[(*d*) Hurd *v.* Lenthall, Sty. 211, 14 Vin. Ab. 182, pl. 5.] Where the objects are more than two, the implication, in order to complete the purpose of filling up the

[But the court will not construe the will as postponing the distribution of every part until the death of the surviving tenant for life, unless an intention so to do is clearly indicated; although the gift in remainder is in terms of the *whole* fund, and appears therefore to have a simultaneous distribution in view, yet, if a tenancy in common is more consistent with the general context, it will be established especially in favor of children, in spite of the apparently antagonistic terms. (*e*) And this construction is readily made where, after the gift to several for life, the remainder is not "*after* their death," but "*at* their death;" for the literal meaning, viz., the simultaneous death of all, could not have been contemplated, and "at their respective deaths" is a meaning more likely to suit the intention than "at the death of the survivor." (*f*)

Intention must be clear.

Gift over "*at* their death."

Where the will creates a tenancy in common with *express* survivorship, there is, of course, no pretence for implying a joint tenancy, (*g*) and each devisee or legatee will have, not a severable interest, but an interest with a contingent gift over to be ascertained only by the event. But in Cookson *v.* Bingham, (*h*) where a testator devised his estates to his daughters, A, B, and C, to be jointly and equally enjoyed or divided in the case

Tenancy in common, with express survivorship, not a joint tenancy.

chasm which would otherwise occur between the decease of the first and last of the tenants for life, must either give joint estates carrying the right of survivorship, or, which would seem better, must, on the decease of each tenant for life after the first, deal with the accruing share or shares of such deceased tenant or tenants for life in like manner. For instance, suppose the devise to be to A, B, and C, as tenants in common for life, and after the decease of the survivor, over. A dies; upon which A's share passes to B and C, it is presumed, as tenants in common. Next B dies; his original share devolves by implied devise to C, but unless his accruing share (*i. e.*, the one-half of A's share which came to B on A's decease) can pass to C, such share would be undisposed of during the remainder of his (C's) life. The implication, therefore, if admissible at all, must, it is presumed, in order to complete its purpose, give B's accruing share, as well as the original one, to C. [Minton *v.* Cave, 10 Jur. 86. See also Marryat *v.* Townly, 1 Ves. 102.

(*e*) Hawkins *v.* Hamerton, 16 Sim. 410; Ewington *v.* Fenn, 16 Jur. 398; Doe d. Patrick *v.* Royle, 13 Q. B. 100; and see Atkinson *v.* Holtby, 10 H. L. Cas. 313, 325.

(*f*) Arrow *v.* Mellish, 1 De G. & S. 355; Willes *v.* Douglas, 10 Beav. 47; In re Laverick's Estate, 18 Jur. 304; Turner *v.* Whittaker, 23 Beav. 196; Archer *v.* Legg, 31 Beav. 187; Wills *v.* Wills, L. R., 20 Eq. 342.

(*g*) Doe d. Borwell *v.* Abey, 1 M. & Sel. 428; Hatton *v.* Finch, 4 Beav. 186; Haddelsey *v.* Adams, 22 Beav. 275; Minton *v.* Minton, 9 W. R. 586; Taaffe *v.* Conmee, 10 H. L. Cas. 64, 78.

(*h*) 17 Beav. 262, 3 D., M. & G. 668.]

of the marriage of any of them; and they, or the sur*vivor in case of death, were authorized to dispose of the same by will or assignment as they should think proper: it was held by Sir J. Romilly, M. R., that the three daughters took as joint tenants in fee, and that A and B being dead, the whole had survived to C; and Lord Cranworth inclined to the same opinion; but as he thought that if it were not so the survivor alone had power under the latter clause to dispose of the fee by will, it was unnecessary to decide the point.]

Distinction between joint tenancy and tenancy in common as to lapse, &c.

III.—It follows as a consequence of the survivorship which is incidental to a joint tenancy, that if the devise fail as to one of the devisees, from its being originally void, (*i*) or subsequently revoked, (*k*) or by reason of the decease of the devisee, in the testator's lifetime, (*l*) the other or others will take the whole.[6] But the rule is different as to tenants in common, whose shares, in case of the failure (*m*) or revocation of the devise to any of them, descend to the heir-at-law (or if the will is subject to 1 Vict., c. 26, the residuary devisee) of the testator: (*n*)[7] unless the devise be to the objects as a class, in which case the individuals composing the class at the death of the testator are entitled among them, whatever be their number, to the entirety of the subject of gift. (*o*)[8]

(*i*) Dowset *v.* Sweet, Amb. 175 [(void for uncertainty;) Young *v.* Davies, 2 Dr. & Sm. 167 (devisee attesting witness).]

(*k*) Humphrey *v.* Tayleur, Amb. 136; [Larkins *v.* Larkins, 3 B. & P. 16; Short *v.* Smith, 4 East 419; Ramsay *v.* Shelmerdine, L. R., 1 Eq. 129, cited *ante* vol. II., p. *155; and see vol. I., p. *340.]

(*l*) Davis *v.* Kemp, Cart. 2, 1 Eq. Cas. Ab. 216, pl. 7; [Buffar *v.* Bradford, 2 Atk. 220; Morley *v.* Bird, 3 Ves. 628.]

6. Stephens' *v.* Milnor, 9 C. E. Gr. (N. J.) 358; De Camp *v.* Hall, 42 Vt. 483; Dow *v.* Doyle, 103 Mass. 489; Putnam *v.* Putnam, 4 Bradf. 308; Craycroft *v.* Craycroft, 6 Harr. & J. 54; Bolles *v.* Smith, 39 Conn. 219; Anderson *v.* Parsons, 4 Me. 486; Gardner *v.* Printup, 2 Barb. 83; Jackson *v.* Roberts, 14 Gray 550; Luke *v.* Marshall, 5 J. J. Marsh. 357; Theobald on Wills 445; Wms. Ex'rs (6th Am. ed.) 1311; 1 Roper on Leg. 482, *et seq.*

[(*m*) Owen *v.* Owen, 1 Atk. 494; Norman *v.* Frazer, 3 Hare 84. It has been held that an appointment void as to an ascertained part (as being to a stranger) follows this rule though in terms which generally create a joint tenancy, In re Kerr's Trusts, 4 Ch. D. 600.]

(*n*) Creswell *v.* Cheslyn, 2 Ed. 123, 3 B. P. C. Toml. 246; [Boulcott *v.* Boulcott, 2 Drew. 25.]

7. Hand *v.* Marcy, 1 Stew. (N. J.) 59; Upham *v.* Emerson, 119 Mass. 509; Nel-

[(*o*) Shaw *v.* McMahon, 4 Dr. & War. 431; Clark *v.* Phillips, 17 Jur. 886; Knight *v.* Gould, 2 My. & K. 295; Dimond *v.* Bostock, L. R., 10 Ch. 360; Fell *v.* Biddolph, L. R., 10 C. P. 701; In re Coleman and Jarrom, 4 Ch. D. 165; Lepine *v.* Bean, L. R. 10 Eq. 160. See also vol. I., pp. *326, *341. But see and consider In re Chaplin's Trusts, 33 L. J., Ch. 183, cited *ante* vol. I., p. *269, n.]

8. Young *v.* Robinson, 11 Gill & J. 328; Yeates *v.* Gill, 9 B. Mon. 206; Bolles *v.*

Gift implied from power creates a tenancy in common.

Here it may be observed that where, in the absence of an express gift, a trust is raised by implication in default of execution of a power of distribution, (*p*) it is now settled that the objects take *as tenants in common*, (*q*) [and] it should seem that under an implied gift resulting from a power of *selection*, [the same rule prevails.] (*r*)

Effect upon power of lapse of some of the shares.

*Where a power is given by will to appoint property among several objects, and the subject, in default of appointment, is given to them individually (and not as a class) *as tenants in common*, a question sometimes arises whether, by the death of any of the objects, the power is defeated in respect of the shares of those objects. The established distinction seems to be, that if all the objects survive the testator, and one of them afterwards dies in the lifetime of the donee of the power, the power remains as to the whole. (*s*) But, on the other hand, if any object dies in the testator's lifetime, by which the gift lapses *pro tanto*, the power is defeated to the same extent. (*t*)

son *v.* Moore, 1 Ired. Eq. 31; Van Buren *v.* Dash, 30 N. Y. 393; Gray *v.* Bailey, 42 Ind. 349; Workman *v.* Workman, 2 Allen 272; Lombard *v.* Boyden, 5 Allen 249; Floyd *v.* Barker, 1 Paige 480; Mason *v.* Trustees Meth. Ch., 12 C. E. Gr. (N. J.) 47; Cummings *v.* Bramhall, 120 Mass. 552.

(*p*) See vol. I., p. *550.

(*q*) Reade *v.* Reade, 5 Ves. 744; [Casterton *v.* Sutherland, 9 Ves. 445; In re Phene's Trusts, L. R., 5 Eq. 346 (to trustees "for the children of A to do what the trustees think best;")] overruling Maddison *v.* Andrew, 1 Ves. 57, [and Lord Hardwicke's *dictum* in Duke of Marlborough *v.* Lord Godolphin, 2 Id. 81.

(*r*) Att.-Gen. *v.* Doyley, 4 Vin. Ab. 485, pl. 16; Harding *v.* Glyn, 1 Atk. 469; In re White's Trusts, Joh. 656 ("for such of my children as my trustees may think fit.")]

(*s*) Boyle *v.* Bishop of Peterborough, 1 Ves., Jr., 299; Butcher *v.* Butcher, 9 Ves. 382, 1 Ves. & B. 79; [Paske *v.* Haselfoot, 33 Beav. 125.]

(*t*) Reade *v.* Reade, 5 Ves. 744; see also Sugd. Pow. (8th ed.) 419, where great pains have been taken to establish the position in the text, in opposition to some remarks of the present writer in his volume appended to Powell Dev. (3d ed.) 374, which remarks he has not here repeated; for though he is still unable to discover any solid ground for the alleged difference of effect in regard to the power, where the partial failure of the gift takes place *before* and where it takes place *after* the death of the testator, yet as the cases commented on by the distinguished writer

Smith, 39 Conn. 217; Downing *v.* Marshall, 23 N. Y. 366; Springer *v.* Congleton, 30 Ga. 977; Schaffer *v.* Kettell, 14 Allen 528; Provenchere's Appeal, 67 Penna. St. 463; Todd *v.* Trott, 64 N. C. 280; Magraw *v.* Field, 48 N. Y. 668; Hoppock *v.* Tucker, 59 N. Y. 202; Stires *v.* Van Rensselaer, 2 Bradf. 172; Theobald on Wills 445; Hawkins on Wills 68; 1 Roper on Leg. 487, *et seq.*; Wms. Ex'rs (6th Am. ed.) 1312.

If, however, under the gift in default of appointment, the objects are joint tenants, or the gift is to a class, of course the decease of any object, even in the testator's lifetime, as it does not occasion any lapse, leaves the power wholly unaffected.

It may be observed, that, as an appointment cannot be made in favor of a deceased child whose share under the gift over had vested, the only mode by which the testator's bounty can be made to reach his representatives is to leave a portion of the fund unappointed; in which case the representatives of the deceased child will take his share (but of course *only* his share) in the unappointed portion. Lord Eldon, it is true, expressed his disapproval of this "device," in Butcher *v.* Butcher, (*u*) but he appears to have objected to it as proceeding upon the erroneous notion that it was necessary to enable the donee to appoint the remainder of the fund to the surviving objects: whereas, according to Boyle *v.* Bishop of Peterborough, his power is extended over *the whole* fund. To avoid all such questions, powers have usually been framed so as to authorize an exclusive appointment *to one or more of the objects; [but this authority is now conferred by statute (*x*) on the donee of every power of distribution (though created before the statute), except so far as the power expressly requires a specific amount or share to be appointed to any of the objects.]

in question seem to favor such a doctrine, and as it is really of more importance that the rules on such points should be certain than that they should be decided in the manner most consistent with principle, he has not felt disposed to revive the discussion.

(*u*) 1 Ves. & B. 92.

[(*x*) 37 and 38 Vict., c. 37. Before this statute a nominal share at least must, notwithstanding 1 Will. IV., c. 46, have been appointed, or left to devolve, to every object.]

*CHAPTER XXXIII.

ESTATES IN FEE, WITHOUT WORDS OF LIMITATION.

I. *What Estate passes by an Indefinite Devise under Wills made before* 1838.

II. *When enlarged to a Fee by a Charge of Debts, Legacies, or Annuities.*

III. ——————— *by a Devise Over in case of Death of Prior Devisees under Age, &c.*

IV. *Effect of words "Estate," "Property," "Real Effects," "Inheritance," "Remainder," "Reversion," "Interest," "Part," "Share," "Perpetual Advowson," &c.*

V. *Effect of* 1 *Vict., c.* 26, *on Wills made or republished since* 1837.

Devise without words of limitation before 1 Vict., c. 26.

I.—Nothing is better settled than that a devise of messuages, lands, tenements, or hereditaments (not estate), without words of limitation, occurring in a will which is not subject to the statute 1 Vict., c. 26, confers on the devisee an estate for life only, (*a*) notwithstanding the testator may have commenced his will with a declaration of his intention to dispose of his whole estate, (*b*) or may have given a nominal legacy to his heir, (*c*) or may have declared an intention wholly to disinherit him, or the will may contain an antecedent devise to the heir for life of the testator's property which is the subject of dispute, (*d*) or the devise in question may be to a class embracing the heir, as to the testator's children, (*e*) [or to

(*a*) Taylor *v.* Hodges, cit. 3 Ch. Rep. 87; [Canning *v.* Canning, Mose. 242]; Deacon *v.* Marsh, Moore 594; Bullock *v.* Bullock, 8 Vin. Ab. 238, pl. 10; Roe d. Kirby *v.* Holmes, 2 Wils. 80; Doe d. Bowes *v.* Blackett, Cowp. 235; Doe d. Crutchfield *v.* Pearce, 1 Pri. 353; [Doe d. Burton *v.* White, 1 Exch. 526, 2 Exch. 797; Doe d. Roberts *v.* Roberts, 7 M. & Wels. 382.]

(*b*) Denn *v.* Gaskin, Cowp. 657, Doug. 760; [Frogmorton *v.* Kershaw, 3 Wils. 414, 2 W. Bl. 889]; Doe d. Child *v.* Wright, 8 T. R., 64, 1 B. & P. N. R. 335; Doe d. Small *v.* Allen, 8 T. R. 497; [Doe d. Knocker *v.* Ravell, 2 Cr. & J. 617.]

(*c*) Roe d. Callow *v.* Bolton, 2 W. Bl. 1045; Right *v.* Sidebotham, Doug. 759; Roe d. Peter *v.* Daw, 3 M. & Sel. 518.

(*d*) Awse *v.* Melhuish, 1 B. C. C. 519; Right d. Compton *v.* Compton, 9 East 267.

(*e*) Dickens *v.* Marshall, Cro. El. 330; [Taylor *v.* Hodges, cit. 3 Ch. Rep. 87; Bowen *v.* Scowcroft, 2 Y. & C. 640; Harding *v.* Roberts, 10 Exch. 819.

a class "to be divided" among them, (*f*) or the same property may have been given to the same persons in another event in fee; (*g*)] or, lastly, notwithstanding there may, in another part of the will, or in the immediate context, *be a devise expressly for life, affording the argument, therefore, that the testator meant something more, or at least different, by an indefinite devise; (*h*) [or notwithstanding that in the immediate context another property may be devised to the same person in fee, and both properties are subsequently in one set of words made subject to one set of ulterior limitations. (*i*)] Though any, or, it is conceived, the whole of these circumstances concur in the same will, it is indisputably clear that such a devise will confer only an estate for life.[1] [The same holds as to devises of lands

Freeholds for lives.

(*f*) Silvey *v.* Howard, 6 Ad. & Ell. 253; Gatenby *v.* Morgan, 1 Q. B. D. 685. Oates *v.* Brydon, 3 Burr. 1895, *contra*, was never followed, and has long been treated as overruled, 2 Pow. Dev. by Jarm. p. 379.

(*g*) Sturgis *v.* Dunn, 19 Beav. 135.]

(*h*) Goodtitle d. Richards *v.* Edmonds, 7. T. R. 635; Awse *v.* Melhuish, 1 B. C. C. 519; Doe d. Briscoe *v.* Clarke, 2 B. & P. N. R. 343; Doe d. Viner *v.* Eve, 5 Ad. & Ell. 317; Silvey *v.* Howard, 6 Ad. & Ell. 253; [Matthews *v.* Windross, 2 K. & J. 406; Tidball *v.* James, 29 L. J., Ex. 91.

(*i*) Coltsmann *v.* Coltsmann, L. R., 3 H. L. 121.]

1. The general rule that a devise without words of inheritance carries only a life estate prevails in this country in the absence of statute to the contrary, Wright *v.* Denn, 10 Wheat. 204; Sheldon *v.* Rose, 41 Conn. 371; Cordry *v.* Adams, 1 Harring. 439; Conoway *v.* Piper, 3 Harring. 482; Doe *v.* Dill, 1 Houst. 398; Dodd *v.* Dodd, 2 Houst. 76; Scott *v.* Alexander, 2 Houst. 241; Fearing *v.* Swift, 97 Mass. 415; Farrar *v.* Ayres, 5 Pick. 404; Ferris *v.* Smith, 17 Johns. 221; Den *v.* Sayre, Pen. (N. J.) 598; Edwards *v.* Bishop, 4 N. Y. 62; Lippen *v.* Eldred, 2 Barb. 131; Jones *v.* Bramblet, 1 Scam. 276; Goodrich *v.* Harding, 3 Rand. 280; Whaley *v.* Jenkins, 3 Desaus. 80, 84; Newton *v.* Griffith, 1 Harr. & G. 111; Lummus *v.* Mitchell, 34 N. H. 39; Jackson *v.* Wills, 9 Johns. 222; Jackson *v.* Embler, 14 Johns. 198; Christie *v.* Gage, 5 Lans. 139; but see, *contra*, Holmes *v.* Williams, 1 Root 341; Cleveland *v.* Spilman, 25 Ind. 95; so Barnard *v.* Bailey, 2 Harring. 56, where, after a gift to his widow for life, the testator adds, "In other words I leave my widow my whole estate forever to be at her disposal at her death except mine and her blood kin," the restriction being void. But in Virginia, prior to the statute, a fee passed without words of inheritance, where such intention could be gathered from the whole will, Johnson *v.* Johnson, 1 Munf. 549. So Tatum *v.* McLellan, 50 Miss. 1; 4 Kent 534. And in South Carolina the act of 1824 is a declaratory law, and therefore retrospective in its operation, Hall *v.* Goodwyn, 4 McCord, 442; Peyton *v.* Smith, Id. 476, 479. In Delaware a devise to be divided between wife and children "as the law directs" was held to refer to the intestate law, and to give the wife but a life estate in half of the property, Burton *v.* Burton, 4 Harring. 38. Where a testator uses introductory words showing an intention to dispose of all his worldly estate, that alone will not suffice to make a subsequent devise, without words of inheritance or other evidence of intention, carry a fee, Wright *v.* Denn, 10 Wheat. 204; Dodd *v.* Dodd, 2 Houst.

held for an estate *pur autre vie* where the heir would have been special occupant.] (*k*)

Grounds for enlarging indefinite devise to a fee.

This rule of construction is entirely technical, as, according to popular notions, the gift of any subject simply comprehends all the interest therein. A conviction that the rule is generally subversive of the actual intention of testators, always induced the courts to lend a willing ear whenever a plausible pretext for a departure from it could be suggested. Hence have arisen the various cases in which indefinite devises have been, by implication, enlarged to a fee-simple, which cases form the next subject of consideration.

II.—It has been long settled that where a devisee, whose estate is

76; Wheaton *v.* Andres, 23 Wend. 452; Weidman *v.* Marsh, 16 Penna. St. 504; Steele *v.* Thompson, 14 Serg. & R. 84; Wyatt *v.* Sadler, 1 Munf. 537, 543; Butler *v.* Little, 3 Greenl. 239; especially where there are several devises, one of which has words of inheritance and the others not, Busby *v.* Busby, 1 Dall. 226; but, *contra*, if there is a clear intention shown by such clause and the absence of all residuary clauses, Den *v.* Allaire, Spencer 8; Charter *v.* Otis, 41 Barb. 529; Shriver *v.* Myer, 19 Penna. St. 89; Wood *v.* Hills, 19 Penna. St. 515; Cassell *v.* Cooke, 8 Serg. & R. 288; Winchester *v.* Tilghman, 1 Harr. & McH. 452; Franklin *v.* Harter, 7 Blackf. 488; Pattison *v.* Doe, 7 Ind. 282; Stevenson *v.* Druley, 4 Ind. 519; Goodrich *v.* Harding, 3 Rand. 280; Davies *v.* Miller, 1 Call 127; Waring *v.* Middleton, 3 Desaus. 249; Clark *v.* Mikell, Id. 168. And where the intention to give a life estate or an estate tail is clearly expressed, neither introductory words expressing an intention to dispose of testator's whole estate nor such other words as "freely to be possessed and enjoyed" will enlarge the estate to a fee simple, Willis *v.* Bucher, 3 Wash. C. C. 369; Gregory v. Cowgill, 19 Mo. 415; so, too, "forever and during her life," Sheafe *v.* Cushing, 17 N. H. 508; "to her use and disposal during her natural life," with limitation over of "what remains undisposed of," Burleigh *v.* Clough, 52 N. H. 267; but such words and introductory clause together will give a fee in the absence of a clear intention to the contrary, Campbell *v.* Carson, 12 Serg. & R. 54; so, too, such introductory clause preceding a gift of two hundred acres to "A or his heirs," and a gift of "the other undivided 100 acres" to B, being unimproved woodland, Caldwell *v.* Ferguson, 2 Yea. 250; so, too, a devise to A, "for him and his mother and the rest of the children to live on until the youngest attain the age of 21 years," Riley *v.* Buchanan, 60 N. C. 479; or a devise "to my widow all my real estate and the interest of $500 for her lifetime," the life clause being held to be restricted to the income of $500, Areson *v.* Areson, 5 Hill (N. Y.) 410.

[(*k*) Doe d. Jeff *v.* Robinson, 2 M. & Ryl. 249, 8 B. & Cr. 296, approved of by Sir E. Sugden, in Allen *v.* Allen, 2 D. & War. 327. And see Doe d. Lewis *v.* Lewis, 9 M. & Wels. 662. But if the devise of the estate *pur autre vie* be to A during the life of the *cestui que vie*, A will of course take the whole estate, and not merely for his own life, Philips *v.* Philips, 1 P. W. 39; Doe d. Lewis *v.* Lewis, *supra*. See also 2 Hayes Conv. 83.

undefined, is directed to pay the testator's debts or legacies, or a specific sum in gross, he takes an estate in fee, on the ground that if he took an estate for life only he might be damnified by the determination of his interest before reimbursement of his expenditure; and the fact that actual loss is rendered highly improbable by the disparity in the amount of the sum charged relatively to the value of the land, does not prevent the enlargement of the estate. (*l*) 2

Charge of a gross sum on the devisee.

For the same reason the future or contingent nature of the *charge does not, as sometimes contended, (*m*) prevent it from enlarging the estate. In Abrams *v.* Winshup (*n*) and Doe *v.* Phillips (*o*) the charge was contingent in effect, though not in

As to contingent charges.

(*l*) Co. Lit. 9 b; 6 Rep. 16 a; Cro. El. 379; Com. Rep. 323]; Moone *v.* Heaseman, Willes 138; Doe *v.* Holmes, 8 T. R. 1; Goodtitle *v.* Maddern, 4 East 496; [Blinston *v.* Warburton, 2 K. & J. 400; Lloyd *v.* Jackson, L. R., 1 Q. B. 571, 2 Q. B. 269 (direction to devisee to educate and settle testator's children.)]

2. A personal charge upon the devisee carries a fee simple where the contrary intention is not manifest, Abbott *v.* Essex Co., 2 Curt. C. C. 126, affirmed 18 How. 202; McRee *v.* Means, 34 Ala. 377; Doe *v.* Dill, 1 Houst. 398; Lindsay *v.* McCormack, 2 A. K. Marsh. 229; Cook *v.* Holmes, 11 Mass. 532, n.; Wait *v.* Belding, 24 Pick. 129; Bell *v.* Scammon, 15 N. H. 381; Jones *v.* Jones, 2 Beas. 236; Olmstead *v.* Olmstead, 4 N. Y. 56; Olmstead *v.* Harvey, 1 Barb. 102, affirmed 1 N. Y. 483; Tator *v.* Tator, 4 Barb. 431; Dumond *v.* Stringham, 26 Barb. 104; Heard *v.* Horton, 1 Denio 165; Jackson *v.* Merrill, 6 Johns. 185; Jackson *v.* Bull, 10 Johns. 148; Jackson *v.* Staats, 11 Johns. 337; Jackson *v.* Housel, 17 Johns. 281; Jackson *v.* Martin, 18 Johns. 31; Spraker *v.* Van Alstyne, 18 Wend. 200; Barheydt *v.* Barheydt, 20 Wend. 576; Niles *v.* Gray, 12 Ohio 328; Harden *v.* Hays, 9 Penna. St. 151; Coane *v.* Parmentier, 10 Penna. St. 73; Fulton *v.* Moore, 25 Id. 468; Fahrney *v.* Holsinger, 65 Id. 388; McCullough *v.* Fenton, Id. 425; King *v.* Cole, 6 R. I. 584; McClellan *v.* Turner, 15 Me. 436; Beall *v.* Holmes, 6 Harr. & J. 205, 208: Glenn *v.* Spey, 5 Md. 110; Gibson *v.* Horton, 5 Harr. & J. 177; *contra*, Dunning *v.* Vandusen, 47 Ind. 423; but not a charge on the property devised, Scott *v.* Alexander, 2 Houst. 241; Olmstead *v.* Olmstead, *ubi supra;* Mesick *v.* New, 7 N. Y. 165; Van Dyke *v.* Emmons, 34 N. Y. 186; Vanderzee *v.* Vanderzee, 36 N. Y. 232; Jackson *v.* Harris, 8 Johns. 141; Jackson *v.* Bull, *ubi supra;* Jackson *v.* Martin, *ubi supra;* Calhoun *v.* Cook, 9 Penna. St. 226: Franklin *v.* Harter, 7 Blackf. 488; McClellan *v.* Turner, *ubi supra;* Mooberry *v.* Marye, 2 Munf. 453; nor where it *may* come from the devised property or another fund, Jackson *v.* Harris, *ubi supra;* Burlingham *v.* Belding, 21 Wend. 463; but see Packard *v.* Packard, 16 Pick. 193; Markwell *v.* Thorn, 28 Wis. 548; Waring *v.* Middleton, 3 Desaus. 249, 253. So, too, a devise on condition that the devisee will convey to a third party lands in which he has an interest, will give to the devisee, upon his making such conveyance, an estate in fee in the lands devised, Gibson *v.* Horton, 5 Harr. & J. 177.

(*m*) Merson *v.* Blackmore, 2 Atk. 341; Doe *v.* Allen, 8 T. R. 497.

(*n*) 3 Russ. 350.

(*o*) 3 B. & Ad. 753.

express terms (being liable, under the general rule, (*p*) to failure in the event of the devisee's dying before majority), and no attempt was made to found a distinction on this circumstance, which indeed seems precluded by the principle that makes the *possibility* of loss the ground of the enlargement of the estate, as such possibility evidently exists as well where the charge is contingent as where it is absolute. So it is wholly immaterial whether the devisee is directed to pay simply, or to pay out of the land. (*q*)

As to devisee being also executor.

Where a devisee who is directed to pay the testator's debts is also appointed executor, the injunction is considered to have relation, not to his duty as executor to discharge the debts, but to his character of devisee of the land, in which therefore he takes a fee. (*r*) [And the fee has been held to pass although the direction to make a particular payment was given to the devisee by the description of "my executrix."] (*s*)

Express estate for life or estate tail not enlarged

The rule under consideration, however, is confined to indefinite devises; for where the direction to pay is imposed on a person to whom there is given an express estate for life, (*t*) [or an estate with a gift over after his death;] (*u*) or an estate tail, (whether limited in express terms, or arising constructively by implication from words introducing the devise over,) (*x*) the charge is inoperative to enlarge such estate for life or estate tail to a fee simple. 3

No enlargement where the charge is upon the land merely.

It is well established, too, that the mere imposition of a burden on the land (without saying by whom it is to be borne) has not the effect of enlarging the estate of any devisee; as where lands are devised to A after debts and legacies are paid, or subject to or charged with the payment of debts

(*p*) *Ante* ch. XXV., § 5.

(*q*) Doe *v.* Snelling, 5 East 87; [Matthews *v.* Windross, 2 K. & J. 406.]

(*r*) Dolton *v.* Hewer, 6 Mad. 9; also Doe *v.* Phillips, 3 B. & Ad. 753; [Johnson *v.* Brady, 11 Ir. Eq. Rep. 386.

(*s*) Pickwell *v.* Spencer, L. R., 6 Ex. 190, 7 Ex. 105, *dub.* Cockburn, C. J.]

(*t*) Willis *v.* Lucas, 1 P. W. 474; [Doe d. Burdett *v.* Wright, 2 B. & Ald. 710.

(*u*) Bolton *v.* Bolton, L. R., 5 Ex. 145.

(*x*) Legatt *v.* Sewell, 2 Vern. 551]; Denn *v.* Slater, 5 T. R. 335; Doe *v.* Owens, 1 B. & Ad. 318.

3. And a personal charge will not enlarge to a fee simple an estate expressly limited in tail, Lithgow *v.* Kavanagh, 9 Mass. 161; Den *v.* Small, Spenc. (N. J.) 151; Burkart *v.* Bucher, 2 Binn. 455; De Witt *v.* Eldred, 4 Watts & S. 414; or for life, Bowers *v.* Porter, 4 Pick. 198; Den *v.* Cook, 2 Halst. 41; Tanner *v.* Livingston, 12 Wend. 83; Gernet *v.* Lynn, 31 Penna. St. 94; Moore *v.* Dimond, 5 R. I. 121; Anderegg *v.* Ross, 13 Ind. 413; Markillie *v.* Ragland, 77 Ill. 98; or for widowhood, Dixon *v.* Ramage, 2 Watts & S. 142.

or legacies, which, in a will that is subject to the old law, confers only an estate for life. (y) And though undoubtedly two cases *may be adduced, (z) in which devises seeming to belong to this class were held to carry the fee, yet one of these cases professedly recognized, while it actually departed from, (a) the principle which distinguishes between charges on the land merely, and charges on the devisee in respect of the land; and in the other case Best, C. J., broadly laid it down that every charge of the land, without distinction, converted an indefinite devise into a gift of the fee; a position which stands directly opposed to the general doctrine of prior cases, and is also irreconcilable with, and must therefore be considered as overruled by, a more recent adjudication. (b)

As to annual charges.

The same principle applies to annual sums charged on real estate, which, if directed to be paid by the devisee of an undefined estate, will enlarge that estate to a fee simple, whether the will directs the annual sum to be paid by the devisee, without more, or by the devisee out of the land. (c)

As to current income exceeding annuity.

And it is immaterial that the current income of the property exceeds the annual sum charged, unless such sum ceases with the estate of the devisee, because, leaving out of consideration possible fluctuations in value, the devisee might, notwithstanding such excess, be damnified, if the annuity should happen to endure beyond his life estate.

Whether annuity enlarges estate of devisee or ceases at his death.

Where the annuity and the estate of the devisee are both indefinite, the alternative presented itself either to restrict the annuity to the life of the devisee of the land, or to enlarge the estate of the devisee of the land to a fee; and the latter alternative was adopted, as being most consistent with

(y) Denn v. Mellor, 5 T. R. 558; S. C. in D. P., 2 B. & P. 247; see also Fairfax v. Heron, Pre. Ch. 67; [Canning v. Canning, Mose. 240; Doe d. Sams v. Garlick, 14 M. & Wels. 698; Vick v. Sueter, 3 Ell. & Bl. 219; Burton v. Powers, 3 K. & J. 170.]

(z) Doe v. Richards, 3 T. R. 356; Gully v. Bishop of Exeter, 12 J. B. Moo. 591, 4 Bing. 293.

(a) But see 1 Cr. & M. 41.

(b) Doe d. Clarke v. Clarke, 1 Cr. & M. 39.

(c) Spicer v. Spicer, Cro. Jac. 527; [Shailard v. Baker, Cro. El. 744]; Baddeley v. Leapingwell, 3 Burr. 1533; Jenkins v. Jenkins, Willes 650; [Goodright v. Allen, W. Bl. 1041]; Goodright v. Stocker, 5 T. R. 13; Right v. Compton, 9 East 267, overruling Ansley v. Chapman, Cro. Car. 157. [And see Pickwell v. Spencer, L. R., 6 Ex. 190, 7 Ex. 105 (direction to pay yearly wages to A); Crozier v. Crozier, 3 D. & War. 384; Morrough v. Lord Dufferin, 2 Jones Ir. Exch. 719.]

probable intention. Where the devise is to a person expressly for life, he paying an annuity to another also expressly for life, the direction to pay the annuity is inoperative (as we have seen the charge of a gross sum is under similar circumstances) to enlarge the devisee's estate; and, in such case, it seems that the annuity continues a burden on the land during the life of the annuitant, even after the determination of the estate of the devisee who *was, in the first instance, made the medium of payment. (*d*) These positions, it will be observed, leave open the question as to the effect of directing a person who takes an express estate for life to pay an annuity to another indefinitely. There would seem to be some ground, in such a case, to contend that the annuity was intended to be co-extensive only with the estate of the person who is directed to pay it, and consequently ceased on the death of the payer, being in fact an annuity for the joint lives of himself and the annuitant; but the writer is not aware of any decision on the point.

As to annuities charged on land.

In consistency with the principle which applies, as we have seen, to charges of gross sums, the imposition of an annuity on any devised lands, in terms which do not make its payment the personal duty of any devisee, leaves the estate created by the will wholly unenlarged and unaffected; (*e*) which doctrine is so well settled, that the difficulty of reconciling every decision (*f*) does not cast the slightest shade of doubt over the principle.

Enlargement to a fee by the effect of a devise over.

III.—The fee simple is also held to pass by an indefinite devise, where it is succeeded by a gift over in the event of the devisee dying under the age of twenty-one years; such devise over being considered to denote that the prior devisee is to have the inheritance in the alternative event of his attaining the age in question, since, in any other supposition, the making the ulterior devise dependent on the contingency of the devisee dying under the prescribed age is very capricious if not absurd. (*g*) 4

(*d*) Willis *v.* Lucas, 1 P. W. 474.

(*e*) See Doe *v.* Clayton, 8 East 141; [Turnough *v.* Stock, 11 Exch. 37.]

(*f*) See Andrew *v.* Southouse, 5 T. R. 292; [Peppercorn *v.* Peacock, 3 M. & Gr. 356, 3 Scott N. R. 651, in Ch., 4 Jur. 1122.]

(*g*) Doe *v.* Cundall, 9 East 400; Marshall *v.* Hill, 2 M. & Sel. 608; Doe *v.* Coleman, 6 Pri. 179; [Burke *v.* Annis, 11 Ha. 232]; overruling Fowler *v.* Blackwell, 1 Com. Rep. 353. [The rule holds as well where the prior devise is contingent as where it is vested, In re Harrison's Estate, L. R., 5 Ch. 408; and as well where the gift over is implied as where it is express, Andrew *v.* Andrew, 1 Ch. D. 410.]

4. So a gift to A without words of in-

The force of this reasoning is somewhat diminished where the devise over confers an estate for life only; but the rule nevertheless applies to such cases, (*h*) as it also does where the contingency is the dying of the prior devisee under any other age than majority; (*i*) and it is not restrained (as has been sometimes laid down by text writers) to cases in which the prior devise is to the children of a devisee for life; (*k*) nor does it matter that another contingency is associated with that of death under the prescribed *age: for instance, an indefinite devise would be enlarged to a fee simple by means of a devise over, to take effect on the prior devisee dying under age *and without leaving lawful issue.* (*l*) In fact, the implication may be plausibly contended for even where the contingency with which death is associated does not relate to the age of the devisee at all; as in the case of a devise to A, and, if he dies without leaving issue living at his decease, then to B in fee. (*m*) [And it was admitted in one case where the devise was to the testator's wife, and if she marry again, over.] (*n*) However, authority forbids the extension of the doctrine generally to cases in which the devise over in fee arises on a collateral event wholly unconnected with the decease of the prior devisee; for, in a case where lands were devised to the testator's wife, with remainder to A and B as tenants in common, and the testator provided that in case C should disturb his said wife in the enjoyment of the premises, the same should go to D in fee; it was held that A and B took estates for life only. (*o*)

Extent of the rule.

Devise over enlarges the prior devise, when.

heritance is a fee simple, if followed by a devise over if A die without issue under the age of twenty-one, Doebler's Appeal, 64 Penna. St. 9. See other cases cited in chap. XXVI.

(*h*) See Frogmorton *v.* Holyday, 3 Burr. 1618, 1 W. Bl. 535.

(*i*) See Doe *v.* Coleman, 6 Pri. 179.

(*k*) Doe *v.* Cundall, 9 East 400.

(*l*) Toovey *v.* Bassett, 10 East 460.

(*m*) See Moone *v.* Heaseman, Willes 142; [In re Harrison's Estate, L. R., 5 Ch. 408; Holland *v.* Wood, L. R., 11 Eq. 91 (where the gift over was found in the elliptical expression "children *or* issue;") also Hutchinson *v.* Stephens, 1 Kee. 240. In this case, though it is difficult to discover any other ground for the decision than such as is furnished by the doctrine suggested, yet the judgment of Lord Langdale, M. R., does not distinctly recognize that doctrine.

The several points briefly stated in the text will be found very fully discussed in the writer's volume appended to Powell Dev. (3d ed.) p. 399, *et seq.*; but as such points cannot arise under wills made or republished since the year 1837, and may therefore never arise at all, the writer has thought the space occupied by the discussion may, in the present work, be more usefully appropriated to the consideration of questions of more enduring utility.

[(*n*) Pickwell *v.* Spencer, L. R., 7 Ex. 105.]

(*o*) Roe *v.* Blackett, Cowp. 235. [So in In re Pollard's Estate, 3 D., J. & S. 541, a devise was to A for life, remainder

Indefinite devise substituted for devise in fee confers life estate only.

It is also abundantly clear that, where an indefinite devise is to take effect in derogation of, or in substitution for, a previous devise in fee (being the converse of the cases just mentioned,) no enlargement of estate takes place. Thus, if lands are devised to A and his heirs, and, in the event of his dying under the age of twenty-one and without issue, to B, B will take an estate for life only. (*p*) Indeed, the seeming absurdity that a testator should mean to defeat an estate in fee for the purpose of substituting a mere life interest which would be the gist of the argument for expanding the second devise to a fee simple is *wholly avoided by holding that the second devise defeats the first *pro tanto* only, which appears to be the sound construction. (*q*)

[Nor if a testator by codicil revokes a devise which he had made by will to A in fee, and leaves the property to B indefinitely, will B take more than an estate for life, although the devise to A is wholly revoked: something more than the mere revocation and new devise must appear by the will to enable a court of law to conclude that the testator meant to put B in all respects in the place of A.] (*r*)

Devise to A in fee, in trust for B indefinitely, gives B a fee.

Where lands are devised to trustees in fee, in trust for a person or a class without any words of limitation, [it is settled that unless a contrary intention appears by the context,] the *cestui que trust* takes an equitable interest co-extensive with the legal estate of the trustees, *i. e.*, a fee. (*s*) [Why,

to his children, but if *he* died without leaving such issue, over: it was held the children took for life only. In Marshall *v.* Hill, 2 M. & Sel. 608, similar expressions were held, apparently by reference to another gift over more fully expressed, to create a fee.]

(*p*) Middleton *v.* Swain, Skinn. 339; Beviston *v.* Hussey, Id. 385, 562; Fairfax *v.* Heron, Pre. Ch. 67; Doe *v.* Holmes, 2 Wils. 80; [Gatenby *v.* Morgan, 1 Q. B. D. 685.]

(*q*) As to the substituted devise for life defeating the prior fee *pro tanto, vide* vol. I., p. *867. [If the substituted devise be to a class, and the context shows that some of the class are intended to take a fee under it, it seems that the others will take the like estate in their shares, Doe d. Orpe *v.* Frost, 1 B. & Cr. 638; In re Harrison's Estate, L. R., 5 Ch. 408.

(*r*) Doe d. Brodbelt *v.* Thomson, 12 Moo. P. C. C. 116.]

(*s*) Challenger *v.* Sheppard, 8 T. R. 597; [Knight *v.* Selby, 3 M. & Gr. 92, 3 Scott N. R. 409; Moore *v.* Cleghorn, 10 Beav. 423, affirmed 12 Jur. 591, 17 L. J., Ch. 400; Hodson *v.* Ball, 14 Sim. 558; Smith *v.* Smith, 11 C. B. (N. S.) 121. In the last case it was argued inversely that the trust being indefinite, and *per se* giving only a life estate, must (on a principle discussed in the next chapter) restrict to the same period the devise of the "real estate" to the trustees, and Doe d. Kimber *v.* Cafe, 7 Ex. 675, was relied on. But there the restriction was effected not by the indefinite gift, but by certain other trusts of clearly defined duration. The rule applies also to the estate given by

it is asked, was the fee simple given to the trustees but for the benefit of the *cestui que trust?* But whatever the ground of the rule, the rule itself is not generally excluded by ulterior limitations which in certain events (that fail) are limited alternatively to, or in total or partial defeasance of, the original gift. (*t*) However, in a case where the indefinite gift was one in the midst of a series of limitations, all expressed in terms pointing to successive remainders, and concluding with one expressly in fee, the rule was held not to apply, though all the ulterior remainders failed in event; the trustees being considered to take as much for the benefit of the ulterior devisees, "including those to whom the fee was given," as of the original *cestui que trust.* (*u*)

The converse case is also true, that where lands are devised to trustees, without words of inheritance, upon trust for one in fee, the trustees take the fee.] (*x*)

Fee implied from a limitation of the trust during minority.

*In Newland *v.* Sheppard, (*y*) Lord Macclesfield held, that under a devise by a testator to trustees in fee, upon trust to pay the *produce* and interest to such of his grandchildren as should be living at the time of his decease, until they should come to the age of twenty-one years or be married, the grandchildren took the fee, his lordship reasoning much on the testator's having vested the fee in the trustees, and given the "*produce*" to the children; though it appears (*z*) that the word "produce" was not in the will. In either case, the construction was altogether unwarranted, and the soundness of the decision has been denied by Lord Hardwicke. (*a*)

Upon its authority, however, Lord Keeper Henley, in Peat *v.* Powell, (*b*) held that where a testator gave all his real and personal estate to his executors, in trust for his younger son G. till he should attain twenty-one, and then the trust to cease, G. took the whole beneficial interest; his lordship observing that *the trust only* was to continue

the legal use. But not to deeds, Holliday *v.* Overton, 14 Beav. 467; Lucas *v.* Brandreth, 28 Beav. 274; Tatham *v.* Vernon, 29 Beav. 604.

(*t*) Yarrow *v.* Knightly, 8 Ch. D. 736; Bennett *v.* Bennett, 2 Dr. & Sm. 266, 273; Maden *v.* Taylor, 45 L. J., Ch. 569.

(*u*) In re Pollard's Estate, 3 D., J. & S. 541.

(*x*) Shaw *v.* Weigh, 2 Str. 798.]

(*y*) 2 P. W. 194, 2 Eq. Cas. Ab. 329, pl. 4. Mr. Cruise, 6 Dig. 641, has inaccurately stated this case to have been recognized in Challenger *v.* Sheppard, 8 T. R. 597.

(*z*) See R. L., cited 2 P. W. 194, n. by Cox.

(*a*) In Fonereau *v.* Fonereau, 3 Atk. 316.

(*b*) Amb. 387, 1 Ed. 479.

during the minority, and that Newland *v.* Sheppard was much stronger. (*c*)

What words create an estate in fee simple.

IV.—The proper and technical mode of limiting an estate in fee simple is to give the property to the devisee and his heirs or to him his heirs and assigns forever; (*d*) but such an estate may, even under wills made before 1838, be created by any expressions, however informal, which denote the intention. Thus, the inheritance in fee was held to pass by a devise to A *in fee simple,* (*e*) to A *forever,* (*f*) or to him *and his assigns forever,* (*g*) (but not to a person and his assigns simply, which gives an estate for life only, (*h*) or to A *and his successors,* (*i*) or to A *et sanguini suo;* (*k*) [to A and *his house,* or A and *his family,* (*l*) *or *stock,* (*m*) to A *or* his heirs, (*n*) to A and his executors,] (*o*) to two *et heredibus* (omitting *suis;*) (*p*) to a man *and his, and to do what he will with it,* (*q*) and even to him *and his* simply; (*r*) to A *to give and sell;* (*s*) to A *to give and sell, and do therewith at his will and pleasure;* (*t*) or to a person to her own use, *to give away at her death to whom she pleases;* (*u*) or *to be at the discretion of* a person. (*x*)

[(*c*) See cases cited *ante* ch. XVII., § 3.

(*d*) Or by a devise to A for life, remainder to his heirs, by the operation of the rule in Shelley's Case, *post* ch. XXXVI. So where the remainder is to the heir (in the singular), unless formal words of limitation are superadded; see this treated of, ch. XXXV., with regard to estates tail (Archer's Case.)]

(*e*) Baker *v.* Raymond, And. 51, 8 Vin. Ab. 206, pl. 8.

(*f*) Co. Lit. 9 b; Whiting *v.* Wilkings, 8 Vin. Ab. 206, pl. 6; 2 Ld. Raym. 1152; [Chamberlaine *v.* Turner, Cro. Car. 129, Jones 195.] See also Heath *v.* Heath, 1 B. C. C. 148.

(*g*) Co. Lit. 9 b.

(*h*) Ib.

(*i*) Webb *v.* Herring, Roll. Rep. 399, pl. 25, 8 Vin. Ab. 209, pl. 1; 3 Bulst. 194; [Att.-Gen. *v.* Gilbert, 10 Beav. 517.]

(*k*) Co. Lit. 9 b; Downhall *v.* Catesby, 8 Vin. Ab. 206, pl. 10.

[(*l*) Chapman's Case, Dy. 333; Wright *v.* Atkyns, 17 Ves. 261. See Lucas *v.* Goldsmid, 29 Beav. 657, where "family" was explained to mean heirs of the body.]

(*m*) Counden *v.* Clerke, Hob. 33.

(*n*) Read *v.* Snell, 2 Atk. 645; and see Plowd. 289.

(*o*) Rose d. Vere *v.* Hill, 3 Burr. 1881; and see Reynell *v.* Reynell, 10 Beav. 21.]

(*p*) Br. Estates, pl. 4; 8 Vin. Ab. 208, pl. 18.

(*q*) Latch 36, [Benloe 11, pl. 9.]

(*r*) Ib. In some manors, copyholds are so limited.

(*s*) Co. Lit. 9 b; 8 Vin. Ab. 206, pl. 7.

(*t*) Whiskon *v.* Cleyton, Br. Dev., pl. 39, 1 Leon. 156, 8 Vin. Ab. 234, pl. 2; Jennor *v.* Hardy, Ib., 1 Leon. 283.

(*u*) Timewell *v.* Perkins, 2 Atk. 103. Where such a phrase is added to an *express* estate for life, it confers a power

(*x*) Whiskon *v.* Cleyton, 1 Leon. 156, 8 Vin. Ab. 235, pl. 7. See also Goodtitle *v.* Otway, 2 Wils. 6.

And in a case (*y*) where a testator, after giving to his wife and her heirs and assigns forever, all the residue of his personal estate, made her "full and whole executrix of a freehold" house, it was held that the fee passed to the wife. [So the appointment by a testator of his nephew "to be his universal heir" was held to give him the fee simple.] (*z*)

But it has been decided that a devise of lands to a person by her "*freely to be possessed and enjoyed*," (*a*) passes only an estate for life; though in an earlier case similar words were held to give a fee, (*b*) but there were other grounds for the construction, particularly an annuity to be paid *by the devisees* out of the estate; (*c*) which charge, in the opinion of Lord Mansfield, also showed that the word "freely" could not refer to exemption from encumbrances; and to this Lord Ellenborough also adverted in Goodright *v.* Barron.

Word *estate* carries a fee, when.

It has been long established that a devise of a testator's "estate" includes not only the *corpus* of the property, but the whole of his interest therein; (*d*) [5] and the same effect has been

only. See Tomlinson *v.* Dighton, 1 P. W. 149, 1 Salk. 239; [Doe *v.* Thorley, 10 East 438: and as to personalty, Reith *v.* Seymour, 4 Russ. 263; but see Maxwell's Will, 24 Beav. 246; and for cases since 1 Vict., c. 26, see § 5, *infra*.]

(*y*) Doe d. Hickman *v.* Hazlewood, 6 Ad. & Ell. 167, 1 Nev. & P. 352; [Doe d. Pratt *v.* Pratt, 6 Ad. & Ell. 180.

(*z*) Jenkins *v.* Lord Clinton, 26 Beav. 121, per Romilly, M. R., *ante* vol. II., p. *63, n. (*h*).]

(*a*) Goodright d. Drewry *v.* Barron, 11 East 220; [Doe d. Ashby *v.* Baines, 2 C., M. & R., 23, 5 Tyr. 655; Bromitt *v.* Moor, 9 Hare 378; see also Lloyd *v.* Jackson, L. R., 1 Q. B. 571, 2 Q. B. 269.]

(*b*) Loveacres d. Mudge *v.* Blight, Cowp. 352.

(*c*) *Ante* p. *270.

(*d*) 2 Lev. 91; 3 Keb. 180; 1 Mod. 100; 3 Mod. 45, 228; 3 Keb. 49; 4 Mod. 89; 1 Show. 349; 1 Salk. 236; 1 Com. 337; 2 Vern. 690; Pre. Ch. 264; 2 Vern. 564; 12 Mod. 594; 2 Ld. Raym. 1324; 2 P. W. 524; 1 Eq. Cas. Ab. 178, pl. 18; 3 P. W. 294; Cas. temp. Talb. 157; Amb. 181; 2 Atk. 38, 102; 3 Atk. 486; 1 Ves. 10; 2 Id. 48; 2 W. Bl. 938; 1 H. Bl. 223; Willes 296; Lofft 95, 100; 4 T. R. 89; 1 B. & P. N. R. 335; 11 East 518; 3 Ves. & B. 160; 3 Br. & B. 85; 2 Sim. 264; [8 Bing. 323; 1 Moo. & Sc. 466; 9 Ad. & Ell. 719; 1 Per. & D. 472; 15 Q. B. 28; 1 Exch. 414.]

5. To the effect that the word "estate" will carry a fee, see Lambert *v.* Paine, 3 Cranch 97; Everts *v.* Chittenden, 2 Day 338; Hungerford *v.* Anderson, 4 Day 368; Donovan *v.* Donovan, 4 Harring. 177; Howard *v.* Howard, 4 Bush 494; Deering *v.* Tucker, 55 Me. 284; Brown *v.* Wood, 17 Mass. 68; Tracy *v.* Kilborn, 3 Cush. 557; Leland *v.* Adams, 9 Gray 171; Parker *v.* Parker, 5 Metc. 134; Allen *v.* Hoyt, 5 Metc. 324; Kellogg *v.* Blair, 6 Metc. 322; Godfrey *v.* Humphrey, 18 Pick. 537; Leavitt *v.* Wooster, 14 N. H. 550; Bell *v.* Scammon, 15 N. H. 381; Forsaith *v.* Clark, 21 N. H. 423; Den *v.* Bowne, 3 Harr. (N. J.) 210; Herbert *v.* Smith, Saxt. 141; Jackson *v.* Delancy, 11 Johns. 365, affirmed 13 Johns. 537; Jackson *v.* Babcock, 12 Johns. 389; Jackson

"Estates."

*given to the word "estates" in the plural number, (e) notwithstanding the doubts expressed by Lord Hardwicke in Goodwyn v. Goodwyn. (f)

v. Robbins, 16 Johns. 587; McCullough v. Fenton, 65 Penna. St. 425; Holme v. Harrison, 2 Whart. 283; Turbett v. Turbett, 3 Yea. 187; Doughty v. Browne, 4 Yea. 179; Hart v. White, 26 Vt. 267; Kennon v. McRoberts, 1 Wash. (Va.) 96; Watson v. Powell, 3 Call 306; Doe v. Kinney, 3 Ind. 50; Whaley v. Jenkins, 3 Desaus. 80, 82; Chamberlain v. Owings, 30 Md. 447, 455; Hammond v. Hammond, 8 Gill & J. 436; but, *contra*, where contrary intention is clear by limitation over on the first taker's death, Zimmerman v. Anders, 6 Watts & S. 218. And a remainder of "all my real and personal estate," after a gift for life, the devisee to pay all debts and legacies, carries a fee, Putnam v. Emerson, 7 Metc. 333. But the word "land" is not equivalent to the word "estate," in this particular, Dougherty v. Monett, 5 Gill & J. 459.

So, too, it has been held that the following expressions are sufficient to carry a fee: "The remainder of my estate real and personal," Peppard v. Deal, 9 Penna. St. 140; "the residue of my property," Fraser v. Hamilton, 2 Desaus. 573; "all the rest of my estate real or personal," Shinn v. Holmes, 25 Penna. St. 142; "the whole of my estate, of every name and nature, both real and personal," Josselyn v. Hutchinson, 21 Me. 339; "all the remainder of my homestead farm," Jones v. Leeman, 69 Me. 489; "the rest of all my property real and personal," Lincoln v. Lincoln, 107 Mass. 590; Hammett v. Hammett, 43 Md. 307; "all my other property," Mayo v. Carrington, 4 Call 476; "the residue, or should any die to whom I have left a legacy * * * all such sums and residues," Elcan v. Lancasterian School, 2 Patt. & H. 53, 68; "all which I have, both real and movable property," Dice v. Sheffer, 3 Watts & S. 419; "all my property not before given away" after devise of life estate, Harrold v. Hoskins, 2 Dev. & Bat. L. 479; "all my goods and effects both real and personal," Ferguson v. Zepp, 4 Wash. C. C. 645; "all my worldly goods and effects * * * my entire movable and immovable property," Geyer v. Wentzel, 68 Penna. St. 85; "all my right in," &c., Newkirk v. Newkirk, 2 Caines 345; "one-half of all and everything," Chamberlain v. Owings, 30 Md. 447, 455; "whatever is not named that I have any right or claim to either in law or equity," Harper v. Blean, 3 Watts 471; "my plantation to W. S.," Peyton v. Smith, 4 McCord 476; "my share of," &c., McClure v. Douthitt, 3 Penna. St. 446, affirmed 6 Id. 414; "my late purchase" (in fee) "from B," Neide v. Neide, 4 Rawle 82; "in fee simple for life," M'Allister v. Tate, 11 Rich. 509; and, by statute, general terms of devise, without words of inheritance, in the absence of plain intention to the contrary, Areson v. Areson, 5 Hill (N. Y.) 410; Wilson v. Wilson, 4 Mon. 159; Pell v. Ball, Speers Eq. 518; Riley v. Buchanan, 60 N. C. 479; Kennedy's Appeal, 60 Penna. St. 511; Fahrney v. Holsinger, 65 Penna. St. 388; McConnel v. Smith, 23 Ill. 611; Fay v. Fay, 1 Cush. 93; Den v. Snitcher, 2 Gr. (N. J.) 53; Hance v. West, 3 Vroom 233; Bell v. Alexander Co., 22 Tex. 350; Baldwin v. Bean, 59 Me. *481. For statutory provisions relating to this subject, see note 10, *infra*.

In Josselyn v. Hutchinson, 21 Me. 339, 340, it was said by Tenney, J.: "The

(e) Macaree v. Tall, Amb. 181; Fletcher v. Smiton, 2 T. R. 656; Roe d. Allport v. Bacon, 4 M. & Sel. 366; [White v. Coram, 3 K. & J. 652.] See also Jongsma v. Jongsma, 1 Cox 362.

(f) 1 Ves. 226.

And it is now settled that the word *estate* will carry the inheritance, though it be accompanied by words of locality, or other expressions referable exclusively to the *corpus* of the property. Thus the fee has been held to pass by a devise

Not restrained by words pointing at locality.

words 'all the estate' of a testator pass a fee simple. The language used in the will before us, 'the whole of my estate, of every name and nature, both real and personal,' may be regarded, if possible, still stronger. Within the term 'estate of every name and nature' must be included a reversionary interest, as well as an estate for life, and is repugnant to the idea, that only the latter was intended." In Sherman *v.* Wooster, 26 Iowa 272, it was held by the court (Dillon, C. J., *dissentiente)*, where the expression was "to my wife one-half of my real estate, also all my personal property during her natural life," that the wife took one-half of the real estate in fee, that the expression "during her natural life" was limited to the personalty. In this case it was said by Wright, J.: "Courts are disposed to give such a construction as will pass an estate of inheritance to the first donee." In Wright *v.* Denn, 10 Wheat. 204, it was held that a gift of "*all the rest* of my lands and tenements" formed no exception to the rule making a devise without words of inheritance a life estate.

"All my lands" is sufficient to pass a fee in Ohio, Smith *v.* Berry, 8 Ohio 365; and in Massachusetts, especially if the lands are wild and uncultivated, Sargent *v.* Towne, 40 Mass. 303; and in Maine, Russell *v.* Elden, 15 Me. 193; and see also, as to argument from the character of the land, Caldwell *v.* Ferguson, 2 Yea. 250. So "all my other lands," Richardson *v.* Noyes, 2 Mass. 56; "all my landed property," Fogg *v.* Clark, 1 N. H. 163; Foster *v.* Stewart, 18 Penna. St. 23; but see, *contra*, in Maryland, Dougherty *v.* Monett, 5 Gill & J. 459. A fee will also pass by the words "all my real and personal property," Morrison *v.* Semple, 6 Binn. 94; "the remaining part of my real property," Niles *v.* Gray, 12 Ohio 328; "all my *leasehold* estate in A," referring to property leased by the testator to the devisee, and so held at the date of the will, Saylor *v.* Kocher, 3 Watts & S. 163; "forever," Everts *v.* Chittenden, 2 Day 338; Barnard *v.* Bailey, 2 Harring. 56; Lyon *v.* Marsh, 116 Mass. 232; "absolutely," Oswald *v.* Kopp, 26 Penna. St. 516; "and their posterity forever," Breckinridge *v.* Denny, 8 Bush 527; "forever for the use of A," Saxton *v.* Mitchell, 78 Penna. St. 479; "to the heirs of A forever," State *v.* Lyons, 5 Harring. 196; (a gift to heirs is construed to be a fee, chap. XXVIII.); "to my oldest daughter 80 acres of land * * * never to to her and and heirs forever, never to be mortgaged nor sold forever," Holliday *v.* Dixon, 27 Ill. 33. So, after a life estate to the widow, "all this plantation to *descend* to my 3 daughters," Johnson *v.* Morton, 10 Penna. St. 249; or "to come to the next male heir according to law," McIntyre *v.* Ramsey, 23 Penna. St. 317; or "after that * * * to fall into the possession of A, laying this injunction * * * not to leave the same to any but," &c., McCullough *v.* Gilmore, 11 Penna. St. 373. And a gift of testator's whole estate to his daughter, with proviso that if she married the title should not pass to her husband, but be "reserved to her and her heirs forever," is a gift in fee, Henry *v.* Gonterman, 1 Metc. (Ky.) 465. See, too, Scanlan *v.* Porter, 1 Bailey 427; Johnson *v.* Johnson, 1 McMullan Eq. 345.

And a devise of "income" for life gives a life estate in the fund, Butterfield *v.* Haskins, 33 Me. 392; Stone *v.* North, 41

of "my estate" or "my estates," (*g*) "*at* A" or "*in* A," (*h*) (for the idle distinction between *at* and *in* would not now be endured,) or "my

Me. 265; Golder, County Judge, *v.* Littlejohn, 30 Wis. 344; or in the land, Thompson *v.* Schenck, 16 Ind. 194; Andrews *v.* Boyd, 5 Greenl. 199; Butterfield *v.* Haskins, *ubi supra;* Mandlebaum *v.* McDonell, 29 Mich. 78; so a provision giving the widow "possession and direction" of a farm, Fuller *v.* Yates, 8 Paige 325; or the "rents and profits," Morgan *v.* Pope, 7 Coldw. 541; Thompson *v.* Schenck, *ubi subra;* Earl *v.* Rowe, 35 Me. 414; Mandlebaum *v.* McDonell, *ubi supra.* So a gift of "the use of" certain land carries a fee, the statute dispensing with words of inheritance, Hance *v.* West, 3 Vroom 233; but such gift will not *ex vi termini* pass the land, (it is only evidence of intention,) Magruder *v.* Peter, 4 Gill & J. 323; or a reservation "forever for the use of A," Saxton *v.* Mitchell, 78 Penna. St. 479; or "as his own property," Stoever *v.* Stoever, 9 Serg. & R. 434. In Stone *v.* North, 41 Me. 265, 271, it was said by Goodenow, J.: "If a devise of the 'use and income' of land is deemed sufficient to vest the land itself in the devisee, we can see no good reason why a bequest of the 'use, income and interest' of personal estate, does not vest the estate itself in the legatee." See also Martz *v.* Sedam, 67 Ind. 216.

And an intention to give a fee has been implied without words of inheritance from a recital of his having made the devises "nearly equal," the other devises being in fee, Cook *v.* Holmes, 11 Mass. 528; Landon *v.* Moore, 45 Conn. 422; or from a valuation of the shares devised, Baker *v.* Bridge, 12 Pick. 27; or from the devises to others of the same class, Walker *v.* Walker, 28 Penna. St. 40; Hoxton *v.* Gardiner, 1 Harr. & McH. 437. And wherever such intention is clear, the devisee will take a fee, Fox *v.* Phelps, 17 Wend. 393, affirmed 20 Wend. 437; Brailsford *v.* Heyward, 2 Desaus. 290; Fraser *v.* Hamilton, Id. 573; Clark *v.* Mikell, 3 Desaus. 168; Beall *v.* Holmes, 6 Harr. & J. 205, 208; Glenn *v.* Spry, 5 Md. 110, 117; Chamberlain *v.* Owings, 30 Md. 447; Blaisdell *v.* Hight, 69 Me. 306. And a gift, without words of inheritance, of unimproved land to A, with one-third of the profits to B for life, has been held to create a fee simple in A, Holmes *v.* Pattison, 25 Penna. St. 484. So a devise to the widow "to enjoy for her life and at her death to leave for" her children, Second Church *v.* Disbrow, 52 Penna. St. 219; or to A in trust for his heirs, to enjoy for his life, but not to dispose of, Kepple's Appeal, 53 Penna. St. 211; or "to be freely possessed and enjoyed," Campbell *v.* Carson, 12 Serg. & R. 54; or to A, and if he die without heirs before he arrives at 21, over, Doebler's Appeal, 64 Penna. St. 9; Sadler *v.* Wilson, 5 Ired. Eq. 296; Felton *v.* Billups, 1 Dev. & Bat. Eq. 584. As to limitations of this character, see *ante* chap. XXVI.

A fee simple will be implied from an unrestricted power of disposal, Hall *v.* Culver, 34 Conn. 404; Cordry *v.* Adams, 1 Harring. 439; Barnard *v.* Bailey, 2 Harring. 56; Moore *v.* Webb, 2 B. Mon. 282; Lyon *v.* Marsh, 116 Mass. 232; Den *v.* Humphreys, 1 Harr. (N. J.) 25; Dutch Church *v.* Smock, Saxt. 148; Borden *v.* Downey, 6 Vroom 74, affirmed 7 Vroom 460; Den *v.* Young, 3 Zab. 478; McLean *v.* McDonald, 2 Barb. 534; Doe *v.* Howland, 8 Cow. 277; Jackson *v.* Coleman, 2 Johns. 391; McDonald *v.* Walgrove, 1

(*g*) Macaree *v.* Tall, Amb. 181.

(*h*) Ibbetson *v.* Beckwith, Cas. temp. Talb. 157; Barry *v.* Edgeworth, 2 P. W. 523; Tuffnell *v.* Page, 2 Atk. 37, Barn. Ch. Rep. 9; Holdfast d. Cowper *v.* Marten, 1 T. R. 411; Uthwatt *v.* Bryant, 6 Taunt. 317, stated *infra* p. *279.

estate *of Ashton*," (*i*) or (which it was said would have been the same in construction,) "my *Ashton estate*," (*k*) and so of "all my *estate*, lands, &c., *called* or known *by*

Or other expressions applicable to *corpus* only.

Sandf. Ch. 274; Funk *v.* Eggleston, 92 Ill. 515; Bradstreet *v.* Clarke, 12 Wend. 602; Helmer *v.* Shoemaker, 22 Wend. 139; Smith *v.* Fulkinson, 25 Penna. St. 109; Morris *v.* Phaler, 1 Watts 389; Culbertson *v.* Duly, 7 Watts & S. 195; Doughty *v.* Browne, 4 Yea. 179; Fairman *v.* Beal, 14 Ill. 244; Christy *v.* Pulliam, 17 Ill. 59; Pickering *v.* Langdon, 22 Me. 413; Ramsdell *v.* Ramsdell, 21 Me. 288; Benkert *v.* Jacoby, 36 Iowa 273; Guthrie *v.* Guthrie, 1 Call 7; Markillie *v.* Ragland, 77 Ill. 98; Shaw *v.* Hussey, 41 Me. 495; Elcan *v.* Lancasterian School, 2 Patt. & H. 53; Purcell *v.* Wilson, 4 Gratt. 16; Rubey *v.* Barnett, 12 Mo. 3; Hazel *v.* Hagan, 47 Mo. 277; Cannon *v.* Raine, Harp. Eq. 3; Swope *v.* Swope, 5 Gill 225. So from a power of appointment, Levy *v.* Griffis, 65 N. C. 236. But where the power of disposal is "at the death" of the devisee, a deed executed by the devisee in his lifetime can have no effect until his death, at which time it will pass the fee, Pulliam *v.* Christy, 19 Ill. 331, 334; Christy *v.* Ogle, 33 Ill. 295. See also Norcum *v.* D'Oench, 17 Mo. 98; Dunning *v.* Vandusen, 47 Ind. 423; Benesch *v.* Clark, 49 Md. 497. But a devise to the widow "to hold and dispose of the same as she may see proper during her widowhood," or during her life, will pass a life estate only, Mulberry *v.* Mulberry, 50 Ill. 67; Boyd *v.* Strahan, 36 Ill. 355; Fairman *v.* Beal, 14 Ill. 244; Funk *v.* Eggleston, 92 Ill. 515. So, too, bequests to the widow which are expressed to be for "her support," or "the education of his daughter," or "the support and education of his young and unmarried children," Swearingen *v.* Taylor, 14 Mo. 391; Martz *v.* Sedam, 67 Ind. 216.

In general, a power of disposal will not enlarge to a fee simple an estate expressly limited for life or in tail, Hatfield *v.* Sohier, 114 Mass. 48; Smith *v.* Snow, 123 Mass. 323; Parker *v.* Parker, 5 Metc. 134; Rail *v.* Dotson, 14 Sm. & M. 176; Dean *v.* Nunally 36 Miss. 358; Edwards *v.* Gibbs, 39 Miss. 166; Funk *v.* Eggleston, 92 Ill. 515; Levy *v.* Griffis, 65 N. C. 236; Dutch Church *v.* Smock, Saxt. 148; Borden *v.* Downey, 6 Vroom 74, affirmed 7 Vroom 460; Fisher *v.* Herbell, 7 Watts & S. 63; Pillow *v.* Rye, 1 Swan (Tenn.) 185; Frazier *v.* Hassey, 43 Ind. 310; Ramsdell *v.* Ramsdell, 21 Me. 288; Shaw *v.* Hussey, 41 Me. 495; Rubey *v.* Barnett, 12 Mo. 3; Scott *v.* Burt, 9 Rich. Eq. 358; so, Sawyer *v.* Dozier, 7 Jones L. (N. C.) 7, where a life estate was given to an infant ward, with a naked power of sale to the guardian. But see, *contra*, Hull *v.* Culver, 34 Conn. 404; so, Second Church *v.* Disbrow, 52 Penna. St. 219, if the general intent to give a fee is clear. Words of mere implication will not convert a life estate into a fee, unless the manifest general intent of the testator requires it, Gregory *v.* Cowgill, 19 Mo. 415; Jackson *v.* Robins, 16 John. 588; Ide *v.* Ide, 5 Mass. 203.

Where a remainder is limited over after a life estate without words of inheritance, a fee is often implied, Plimpton *v.* Plimpton, 12 Cush. 463; Smiley *v.* Bailey, 59 Barb. 80; Hall *v.* Dickinson, 1 Grant Cas. 240; but otherwise in Clayton *v.* Clayton, 3 Binn. 483. After a life estate to the widow in one-half of the plantation, a devise of the plantation "except what has been devised to my wife," carries the fee subject to the life estate in one-half, French *v.* McIlhenney, 2 Binn. 13.

A devise to executors in trust to sell for debts and funeral expenses within six

(*i*) Chichester *v.* Oxenden, 4 Taunt. 176, 4 Dow. 92.

(*k*) 4 Taunt. 177.

the name of the Coal Yard, in the parish of St. Giles, London," (*l*) or of "all that estate *I bought of A;*" (*m*) [or of "my landed estates in W. of whatever description, with their appurtenances and all allotments of common."] (*n*)

Reference to occupancy not restrictive of word *estate*.

So, in Gardner *v.* Harding, (*o*) it was held that a devise to G. of "my freehold *estate, consisting of* thirty acres of land, more or less, with the dwelling-house, and all erections on the said farm, situate at ——, in the county of ——, *now in the occupation of G.*" vested in G. an estate in fee simple.

"Estates, that is to say, my lands," situate, &c.

So, where (*p*) a testator gave to his wife H. all his real and personal *estates* whatsoever, *that is to say*, his land, houses, and all other buildings situate in Stamford Bridge, in the county of York, *upon his estate*, and likewise all his household furniture and stock in trade unto the said H., it was decided that H. took the fee in the real estate. [And a similar decision was made

months after testator's death, and a residuary devise to testator's sons, gives the sons an estate in fee subject to the power of sale, Dunshee *v.* Goldbacher, 56 Barb. 579; S. C., 8 Abb. Pr. (N. S.) 439. But a devise to an executor, to be sold for the payment of debts and legacies, with power to give deeds in fee, gives the legal estate to the executor in fee and in trust, Inman *v.* Jackson, 4 Greenl. 237; Richardson *v.* Woodbury, 43 Me. 206. And if trusts are created by will, which require for their proper execution that the trustee take an estate in fee, such estate will be implied, Deering *v.* Adams, 37 Me. 264. And a devise to executors, *in trust* for the testator's children until the youngest attain twenty-one, vests a fee simple estate in the executors *in trust*, defeasible upon the youngest child's arriving at twenty-one, Pearce *v.* Savage, 45 Me. 90.

A naked power of sale will carry no estate to the donee of the power, Jackson *v.* Scauber, 7 Cow. 187; S. C., 2 Wend. 13; Doe *v.* Lanius, 3 Ind. 441; Thompson *v.* Schenck, 16 Ind. 194. But if he cannot carry out the provisions of the will without taking a legal title to the property, he will take such title, Morton *v.* Barrett, 22 Me. 257; Deering *v.* Adams, *ubi supra.*

As to personal property, a gift without words of inheritance is an absolute gift of the whole, Chinn *v.* Respass, 1 Mon. 25; Bailey *v.* Duncan, 4 Mon. 257; Boyd *v.* Strahan, 36 Ill. 355; so where there is a power of disposal, Wells *v.* Doane, 3 Gray 201; Flintham's Appeal, 11 Serg. & R. 16, unless it be expressly for life with power of disposal. See Hall *v.* Gillespie, Phill. Eq. 256. And where *personal* estate and *real* are given in the same clause, the *real* will pass as *absolutely* as the *personal*, Wyatt *v.* Sadler, 1 Munf. 537; Johnson *v.* Johnson, Id. 549. But see Hall *v.* Gillespie, *ubi supra;* Boling *v.* McClelland, 66 Ind. 373.

(*l*) Roe d. Child *v.* Wright, 7 East 259; and see Price *v.* Gibson, 2 Ed. 115; Stewart *v.* Garnett, 3 Sim. 398; [White *v.* Coram, 3 K. & J. 652.]

(*m*) Bailis *v.* Gale, 2 Ves. 48.

[(*n*) Cookson *v.* Bingham, 3 D., M. & G. 668, overruling the doubt of Lawrence, J., in Pierson *v.* Vickers, 5 East 554.]

(*o*) 3 J. B. Moo. 565, 1 Br. & B. 72. See also Paris *v.* Miller, 5 M. & Sel. 408, but *vide infra.*

(*p*) Denn d. Richardson *v.* Hood, 7 Taunt. 35.

where the order of the words was reversed thus, "I give Horsecroft, *my estate that I now live on*, to J. P."] (q)

"H., my estate that I now live on."

The preceding cases seem to overrule Pettiward *v.* Pres*cott, (r) where Sir W. Grant, M. R., held that a devise to R. P. of the testator's "*copyhold estate at Putney, consisting of three tenements, and now under lease to A. B.* for a term," &c., conferred an estate for life only, his Honor being of opinion that the testator did not mean to speak of the quantity of interest, but merely of the *corpus* or subject of disposition. The M. R. relied upon the *dictum* of Lord Kenyon, in Fletcher *v.* Smiton, (s) who cited Lord Hardwicke's observation in Goodwyn *v.* Goodwyn, (t) that no case had occurred in which it had been held that the fee passed by the devise of an estate, if the testator added, *in the occupation of any particular tenant;* but Lord Kenyon omits the subsequent remark of this great lawyer, *that there was no reason why such words should restrain it more than locality*, which he observed would not.

Pettiward *v.* Prescott overruled.

The rule which reads the word "estate" as comprising the testator's interest in the land, though accompanied with words referring to locality, has sometimes been considered as going too far; but the censure seems unjust. The additional expressions only show that the testator had the *corpus* of the land in his contemplation, to describe which is unquestionably always *one* of the offices of the term *estate* so used. The interest cannot be included without the locality, but the locality may without the whole interest. Why, then, should the word be deprived of the larger meaning by expressions showing that the testator had the other in his view?

Rule which makes words of locality inoperative to restrain "estate," defended.

It is clear that the word *estate* is not prevented from carrying the fee, by the circumstance of the testator having used the same word in another devise, where it can have no such operation, because the devisee's interest is there expressly confined to his life.

As to *estate* being elsewhere used in an express devise for life.

Thus, in Randall *v.* Tuchin, (u) where a testator devised to his

[(q) Doe d. Pottow *v.* Fricker, 6 Ex. 510.]

(r) 7 Ves. 541. See also Chorlton *v.* Taylor, 3 Ves. & B. 160, where his Honor avoided deciding whether a reference to the occupation restrained the operation of the word "estate."

(s) 2 T. R. 658.

(t) 1 Ves. 228.

(u) 6 Taunt. 410, and Ibbetson *v.* Beckwith, Cas. temp. Talb. 157; [Arminer's Case, Lofft 95]; but see the observation of Willes, C. J., in Moone *v.* Heaseman, Willes 138, in regard to the word "in-

niece J. fourteen dwelling-houses, with their appurtenances (minutely describing them,) *all of which estates*, being copyhold and held of the manor of K., he devised to the said J. for her separate use *for her life*, and after her decease to her son M.; it was held that M. took the fee by force of the word *estates;* *which it was considered was further strengthened by a direction introduced into the devise, that so long as W. should choose to live in a certain house (part of the devised property,) and should keep the same in repair, he should not be charged more than his present rent. (*x*)

Or in an express devise in fee, immaterial.

By parity of reasoning, too, it is clear that where the word *estate* occurs elsewhere in the same will, in company with express words of limitation in fee, its operation to confer the inheritance is not thereby restrained. (*y*)

And as neither the association of the word "estate" with words of locality, nor its being used elsewhere in conjunction with express words of limitation, prevents it from passing the fee, so those circumstances conjointly occurring in the same will are equally inoperative to produce this effect.

Preceding grounds occurring conjointly inoperative to neutralize effect of word "estate."

Thus, where (*z*) a testator devised a rent charge to be issuing out of all his real *estate*, lands, tenements and hereditaments in P., and then devised his said estate, lands, &c., to M. her heirs and assigns forever; but in case she should die under twenty-one and without lawful issue, then he devised his said *estate*, lands, &c. unto A. during her life, and after her decease the testator devised all his said *estate*, &c., to the children of H. as tenants in common: Lord Gifford, M. R., held that notwithstanding the connection of the word estate with words of locality and of limitation, it was sufficient to carry a fee to the children of H. He hesitated, however, to compel a purchaser to take a

heritance," which is inconsistent with the principle of these and many other cases; [and see Doe *v.* Lean, 1 Q. B. 229, *post* p. *282.]

(*x*) The cases stated in the text seem to overrule Awse *v.* Melhuish, 1 B. C. C. 519, where Eyre, B., held that a devise by a testator of all his estates and effects, lands and hereditaments, to A and B during their joint lives, *and to the survivor of them*, did not carry a fee to the survivor, because the same words were used in devising the express estate during the joint lives; but see Doe *v.* Gwillim, 2 Nev. & M. 247, 5 B. & Ad. 122, stated *post* p. *281.

(*y*) Uthwatt *v.* Bryant, 6 Taunt. 317, stated *infra*. See also Ibbetson *v.* Beckwith, Cas. temp. Talb. 157, [which overrules,] Chester *v.* Painter, 2 P. W. 336. The principle stated in the text extends to all words having the force of including the interest, Norton *v.* Ladd, 1 Lutw. 755, *infra* p. *284.

(*z*) Wilkinson *v.* Chapman, 3 Russ. 145.

title depending on that construction; but the purchaser consented to a case being sent to the Court of K. B., and that court being of opinion that the children of H. took the fee, specific performance was decreed.

So, where (*a*) a testator devised the moiety of the rents of his *estate*, named Islington and Cove's Penn, in the parish of St. Mary, Islington, to be divided equally among his grandchildren; the other moiety of the rents of his said estate and Penn he devised to his son, R. S., and his heirs forever: Sir L. Shadwell, *V. C., held that the grandchildren took the fee, on the ground that the devise of the rents of the estate was the same as a devise of the estate itself.

Word "estate" must occur among the very words of gift.

[With respect to the word "estate," and other words of similarly extensive signification, it seems now settled that it is sufficient, but at the same time necessary that] (although their operation is not restricted by being used as synonymous with and referential to an anterior term of description not capable of carrying the fee) [they should be contained amongst the very words of the gift; for if the dispositive part of the will contains only the words "house," "land," and others of like limited force, a fee will not pass merely because the subject of devise is elsewhere devised or described by the term "estate." "The principle," said Heath, J., in Randall *v.* Tuchin, (*b*) "is, that where the word 'estate' is an operative word, it passes the fee, and to try whether it be operative or not the test is to strike it out of the will."

Instances of "estate" occurring in the words of gift, Doe *v.* Bacon.

Uthwatt *v.* Bryant.

That it is sufficient appears from Doe d. Allport *v.* Bacon, (*c*) where the testator devised all his freehold lands, messuages and tenements to his wife for her life, and after her decease, then all *the said estates* to be divided among his four sons and his son-in-law, share and share alike. It was held that the sons and son-in-law took in fee simple.] So, in Uthwatt *v.* Bryant, (*d*) where a testator devised all his freehold lands, tenements, tithes, hereditaments and premises in the parish of B. to certain persons for life, with remainders over, and on a given event devised his *said freehold estate* in the parish of B. to his daughters, as tenants in common; and in case such his said children should die in the lifetime of his wife, then he devised all his said freehold

(*a*) Stewart *v.* Garnett, 3 Sim. 398.
[(*b*) 6 Taunt. 410.
(*c*) 4 M. & Sel. 366.]
(*d*) 6 Taunt. 317. [And see Bolton *v.* Bolton, L. R., 5 Ex. 145.]

estate in the parish of B. to his wife and her heirs forever: it was contended that, inasmuch as the testator had twice described the subject of devise by words not capable of carrying the fee, when he afterwards devised it by the term, "the said freehold estate in the parish of B.," he thereby gave only the same thing as he had before given, and that therefore the daughters took estates for life only; but the court certified that they took the fee.

Instances where "estate" did not occur in words of gift.

[That it is necessary appears from] Doe d. Bates *v.* Clayton, (*e*) where a testator devised to his daughter £20 a year out of the profits of his *estate* or lands *at Eaton*, and then devised to his *grandson B. *his messuage at Eaton, with the houses and hereditaments thereunto belonging, and certain parcels of land at Eaton;* and he declared his further will to be, that B., when he arrived at the age of twenty-one years, should enter upon and enjoy *the above-mentioned estate*, with the hereditaments thereunto belonging, situate at Eaton aforesaid. But he provided that if B. should run away from his profession, all his right, title and claim to the *estate* of lands and houses devised to him should devolve and *descend* to his brother M.; it was held that the word *estate*, being by its reference restricted to the antecedent words of devise, did not pass a fee, as those antecedent words would not do so: though the court decided that other expressions in the will had that effect. (*f*) [So, in Doe d. Clarke *v.* Clarke, (*g*) the testator devised to his brother a dwelling-house and garden, with all lands appertaining to the same, *the said property* lying and being in the township of W.; the court said the word "property" was not used to describe the *quantum* of estate to be taken, but the local situation, and thus the devisee only took an estate for life.]

Doe v. Clarke.

Word "estate" occurring in introductory clause.

It [follows from these authorities] that the word *estate* occurring merely in the introductory clause in the will, by which the testator professes in the usual manner his intention to dispose of all his worldly and temporal estate, will not have the effect of enlarging the subsequent devises in the will. (*h*) As where a testator says, "As to all my worldly estate, I

(*e*) 8 East 141.

(*f*) Principally a direction that N. B. (the husband of one of the testator's coheiresses-at-law) should not come upon any of his hereditaments.

[(*g*) 1 Cr. & Mees. 39. See also Doe d. Burton *v.* White, 1 Ex. 526, 2 Ex. 797; Vick *v.* Sueter, 3 Ell. & Bl. 219. That "property" carries the fee, *vide inf.* p. *283.]

(*h*) Ibbetson *v.* Beckwith, Cas. temp. Talb. 157; Frogmorton *v.* Wright, 2 Bl.

dispose thereof as follows;" and then proceeds to devise his real estate by a description which will not include the interest, as "lands, tenements, hereditaments," &c.

[But in Gall *v.* Esdaile, (*i*) the testater devised "his worldly estate as follows," and then gave some legacies, and proceeded, "As to the rest of my estate, the two houses, one in L. and the other in T., I give to my wife for her life, and after her decease that in L. to my daughter, and the other between my two sons." It was held that the daughter took a fee in the house devised *to her. The words "as to the rest of my estate" evidently overrode the whole clause, and the subsequent words only parceled out the different portions.

Neither can] the word *estate*, occurring in a devise which gives an express life estate only, be extended by implication to a subsequent limitation of the same property, wherein the subject of devise is described by some other term. Thus it has been decided (*k*) that where a testator devised to his wife E. all his freehold and leasehold messuages, houses, lands and tenements, and *all his estate and interest therein*, for her natural life, and after her decease he devised *his said messuages, houses, lands and tenements*, to S. and M. as tenants in common, the latter devisees took estates for life only, the words *estate and interest* being left out in the devise to them.

Whether "estate" applies to more than one devise.

So, in Doe d. Norris *v.* Tucker, (*l*) where a testator devised "unto my dearly beloved wife Jane, my freehold *estate*, called Pouncetts, during her natural life," and then after bequeathing his stock, goods and chattels to her for life, he added, "Item, all the above *bequeathed lands*, goods and chattels, I give and devise to," &c., mentioning his children, without words of limitation. The question was, whether a fee passed by the devise to the children, and it was decided in the negative.

Force of the word "estate" not communicated to other words by which subject of gift was subsequently described.

889, 3 Wils. 414; Lovacres d. Mudge *v.* Blight, Cowp. 352; Denn d. Gaskin *v.* Gaskin, Id. 657; Wright *v.* Russell, cited Cowp. 661; Doe d. Small *v.* Allen, 8 T. R. 503; [In re Pollard's Estate, 3 D., J. & S. 541; Lloyd *v.* Jackson, L. R., 1 Q. B. 571, 2 Q. B. 269]; but see Grayson *v.* Atkinson, 1 Wils. 333.

[(*i*) 8 Bing. 323, 1 Moo. & Sc. 466. It had been decided otherwise in chancery, 1 R. & My. 540.]

(*k*) Roe d. Bowes *v.* Blackett, Cowp. 235; [and see Vick *v.* Sueter, 3 Ell. & Bl. 219; Sturgis *v.* Dunn, 19 Beav. 135.]

(*l*) 3 B. & Ad. 473. See this case referred to 7 Ad. & Ell. 206; and see some remarks 2 Hay. & Jarm. Conc. Wills (3d ed.) 240.

A nice question of this nature occurred in Doe *v.* Gwillim, (*m*) where the testator thus expressed himself:—"As touching such worldly *estate* wherewith it has pleased God to bless me, I give demise and dispose of the same in the following manner." He then gave the whole of his *estates* and chattels to his wife during her widowhood, adding, "but demeatly to go to my dear children as I have appointed and disposed to them, in lots and in money: Second, to my son J., I leave ten pounds out of my goods and chattels to be paid him: Thirdly, to my son H., I leave the pece of ground called, &c., to him, his lawful aires forever, and if no aires, to his next brother and his lawful aires forever: Fourthly, to my son G., I leave the pece of ground, &c., (similar devises to other sons, with words of inheritance;) also to my son J., I leave my *dwelling-house and nail-shop, and sider-mill, stables, and pigs-cot, garden, brew-house, and the pece of ground *adjoining it;* also, my goods and chattels and living stock that I shall leave; also, to my daughter M., I leave the house called, &c., and to her son H. and his lawful aires forever." The Court of K. B. held that J. took an estate for life only in the dwelling-house, nail-shop, &c.; relying chiefly on the circumstance, that the testator had used words of limitation in every other instance; and Patteson, J., expressed his indisposition to carry the effect of the word "estate" further than had been done already.

"Estate" to A for life, and after his death "the same" to B.

Where a testator devises an estate called Blackacre to A for life, and then gives "*the same*" to B, the latter devise [has been held not to give the fee to B. (*n*) The ground of this construction is not very clear, but appears to be that as the word "estate" in the first gift clearly did not mean all the testator's interest, but was only a description of the subject of gift, a different signification could not be given to the word "same." The omission of words of locality would seem not to vary this construction.]

"Estate" restrained by the context.

Of course the operation of the word "estate" to confer an estate in fee, may be controlled by the context. As where (*o*) the testator devised to his nephew G. all his *estates*, lands,

(*m*) 5 B. & Ad. 122, 2 Nev. & M. 247. [The *dicum* of Patteson, J., cited in the text, is not reported in B. & Ad.

(*n*) Doe d. Lean *v.* Lean, 1 Q. B. 229, 4 Per. & D. 662; Wight *v.* Leigh, 15 Ves. 564. But see Challenger *v.* Sheppard, 8 T. R. 597. In the first case, some stress was laid on the devise being of "an estate," not "my estate;" see Bailis *v.* Gale, 2 Ves. 48.]

(*o*) Bruce *v.* Bainbridge, 5 J. B. Moo. 1, 2 Br. & B. 123. The principle above

tenements and hereditaments in H., with a general limitation over in case any of his nephews died under twenty-one; (*p*) and a subsequent part of his will declared it to be his intent to prevent waste by making his nephews *tenants for life only;* and authorized them, in case they married, to make settlements upon their wives, and dispose of their estates among the issue of such marriages: it was held that G. took only an estate for life.

[Again, in Key *v.* Key, (*q*) where a testator devised his estate at A to S. K. for life, and after his decease he gave "the aforesaid estate" to the eldest surviving son of S. K., but in default of issue male to T. K., and to his eldest surviving son; and in *default of issue male the testator's will was that the premises should devolve to his own right heirs: it was held that "the eldest surviving son" of S. K. did not take an estate in fee simple by force of the word "estate;" for if he did, then in the event (which was probable and actually happened) of there being "an eldest surviving son" of S. K. who became entitled to the property, every subsequent limitation was, from the moment of S. K.'s death, annihilated.]

But it has been held (*r*) that the mere circumstance of the testator's subjecting the property to a certain annuity during the life of the devisee, *with a considerable augmentation of it after her decease,* did not evince an intention to give her only an estate for life, under a devise *of all his property both real and personal forever.* 6

This leads to the remark, that the word *property* is equivalent to *estate,* in its operation to pass the interest as well as the land; (*s*) and the same construction has also been given to

"Property."

stated seems to be the true ground of this decision, though it was much urged as turning on the effect of the word "issue." In the devise in question, however, the mention of issue occurs only in the power, [and compare Spry *v.* Bromfield, 7 M. & Wels. 545, 10 Sim. 94. The power would not of itself have cut down the word "estate," Howarth *v.* Dewell, 29 Beav. 18.]

(*p*) That this would also have given the devisee an implied fee, see *ante* p. *271.

[(*q*) 4 D., M. & G. 73. See also Martin *v.* M'Causland, 4 Ir. Law Rep. 340; Earl of Tyrone *v.* Marquis of Waterford, 1 D., F. & J. 613.]

(*r*) Doe d. Lady Dacre *v.* Roper, 11 East 518.

6. See note 5, *supra.*

(*s*) Roe d. Shell *v.* Pattison, 16 East 221; Nicholls *v.* Butcher, 18 Ves. 193; Patton *v.* Randall, 1 J. & W. 189; [Doe d. Booley *v.* Roberts, 11 Ad. & Ell. 1000, 3 Per. & D. 578; Footner *v.* Cooper, 2 Drew. 7; Bentley *v.* Oldfield, 19 Beav. 225; Coltsmann *v.* Coltsmann, L. R., 3 H. L. 121.]

"Real effects."

a devise of the residue of the testator's "real effects:" 7 (*t*) though it will be remembered that the word *effects*, unaided by the context, [has never been held to] comprehend land, (*u*) which of course is always a preliminary inquiry. [The phrase "all that I die possessed of" is also one which, if it carries real estate at all, would seem sufficient to carry the fee.] (*v*)

"All that I die possessed of."

And here the reader is referred to a former chapter, (*x*) for many instances in which the fee has been held to pass by very informal expressions, such as "all I am worth," and other similar phrases, which were adjudged not only to embrace real estate (this being, in fact, the principal point of contest,) but also to confer on the devisee an estate of inheritance.

It is clear that the word *inheritance* will carry the fee; (*y*) *and Lord Holt seems to have considered the word *hereditaments* (*z*) to be equivalent; but it is now established that a devise of hereditaments carries only an estate for life. (*a*) A devise of "all my copyhold in the said hamlet of H.," has received a similar construction. (*b*)

"Inheritance."

"Hereditaments."

It has been held, that a remainder in fee will pass by the word *remainder*. Thus, in the early case of Norton *v.* Ladd, (*c*) A having the remainder in fee, subject to a life estate in his mother, devised the lands to his sister for life after the decease of his mother, then he gave to J. C. the *whole remainder of all those lands* he had devised to his sister, if he should survive his sister; but if he died

"Remainder."

7. See note 5, *supra*.

(*t*) Hogan *v.* Jackson, Cowp. 299, 3 B. P. C. Toml. 388, stated vol. I., p. *723; [Macnamara *v.* Lord Whitworth, Coop. 241: Lord Torrington *v.* Bowman, 22 L. J., Ch. 236.] See also Grayson *v.* Atkinson, 1 Wils. 333, stated vol. I., p. *724.

(*u*) *Ante* vol. I., p. *744.

(*v*) Per Bosanquet, J., Wilce *v.* Wilce, 7 Bing. 675, stated *ante* vol. I., p. *739. But see Cook *v.* Jaggard, L. R., 1 Ex. 125, as to which case, however, see vol. I., p. *742, n.]

(*x*) Chap. XXII.

(*y*) Widlake *v.* Harding, Hob. 2, Godb. 207, Moore 873, cas. 1218, *nom.* Whitlock *v.* Harding. According to the report in Moore, the expression was "my lands of inheritance," which it is pretty clear would not now be held to confer more than an estate for life, as the word "inheritance" is merely to identify the lands. As to the expression "trustees of inheritance," see next chapter.

(*z*) Smith *v.* Tindal, 11 Mod. 103. See also Lydcott *v.* Willows, 3 Mod. 229.

(*a*) Hopewell *v.* Ackland, 1 Salk. 239; Canning *v.* Canning, Mose. 240; Denn d. Mellor *v.* Moor, 5 T. R. 558, 6 Id. 175, 1 B. & P. 558, 2 Id. 247; Doe d. Small *v.* Allen, 8 T. R. 503.

(*b*) Doe d. Winder *v.* Lawes, 7 Ad. & Ell. 195.

(*c*) 1 Lut. 755; [Baker *v.* Wall, 1 Ld. Raym. 187.]

before his sister, then his will was, that the whole remainder and reversion of all the said lands should be to the use of his sisters and their heirs forever. It was contended that J. C. took only an estate for life, for that these words referred merely to the remainder of lands, and not of the interest; but the court said that could not be, as the whole of the lands had been before devised. It referred to the residue of the estate undisposed of to his sister, and consequently a fee passed to J. C.

So, in the case of Bailis *v.* Gale, (*d*) a reversion *in fee* was held to pass under a devise of the "*reversion*" of certain tenements. But in the anterior case of Peiton *v.* Banks (*e*) (which was not cited in Bailis *v.* Gale), where a man devised lands to his wife for life, and, as to the said lands, he gave *the reversion* to A and B, to be equally divided betwixt them; it was held, that A and B were tenants in common *for life* only; and Serjeant Maynard, at the bar, said he remembered a stronger case, in which a man, having given lands to his wife for life, devised *the reversion* to A and B, A *being his heir-at-law;* yet it was adjudged that B took an estate for life only.

"Reversion."

The only distinction between these cases and Bailis *v.* Gale is that, in the latter, the testator's estate consisted of a reversion, whereas, in the two cases just stated, the subject to which the word "reversion" was applied, was the interest remaining *undevised*, after the limitations created by the will. This circumstance, however, seems not to vary the principle, and it is *probable that the word *reversion* would now be held, on the authority of Bailis *v.* Gale, to pass a fee, even in cases of the latter class.

Remark on Peiton *v.* Banks, and Bailis *v.* Gale.

But though the words *remainder* and *reversion*, applied to property of this description, will pass the testator's entire interest therein, yet it is clear that the terms *residue* and *remainder*, as ordinarily used in residuary clauses, will not have such effect. (*f*)

"Residue" and "remainder" as used in residuary clause.

It has been held, that a devise of freehold lands, with *all right and title to the same*, carries the fee; (*g*) and the word "interest" would unquestionably have the same effect. (*h*) 8

"Right and title."

"Interest."

(*d*) 2 Ves. 48. But see And. 284.

(*e*) 1 Vern. 65.

[(*f*) Canning *v.* Canning, Mose. 240; Denn d. Moor *v.* Mellor, 5 T. R. 558, 2 B. & P. 247.]

(*g*) Sharp *v.* Sharp, 4 M. & Pay. 445, 6 Bing. 630.

(*h*) Andrew *v.* Southouse, 5 T. R. 292.

8. See note 5, *supra*.

When words "part," "share," "moiety," carry a fee.

When they do not.

[It was at one time a question whether under a devise by a testator of "his moiety," "his part," or "his share," of lands the devisee would take an estate in fee, but it seems now settled that he will; (*i*)[9] unless a contrary intention appears by the will, as, where the indefinite gift is one in the midst of a regular series of limitations expressed as remainders one to another. (*k*) The words, however, have this force only where the moiety, part, or share belongs as such to the testator himself. Thus, where houses were given among the testator's children as tenants in common in tail, and if any of his children died before twenty-one or unmarried, the *part or share of him or her* so dying to go over to the survivors, it was held that by the devise over the survivors took life estates only. (*l*)

Estate in fee given by force of words of exception.

An estate in fee may also be conferred by force of words of exception. Thus, where a testator devised to his two sons the *estate* he occupied, with the factory thereon, except the *house* he occupied, which he gave to his daughters, share and share alike, it was held that the daughters took an estate in fee in the house. Tindal, C. J., said, the exception out of the devise by necessary intendment carried the same quantity of estate as that from which it was excepted. (*m*)

Estate in fee given by force of substitutional gift.

*Again, where lands were devised to A without words of limitation, and, in a certain event, those lands were devised away from him to another in fee, and other lands substituted in which an express estate in fee was given to A, A took a fee under the first devise, by reason of the apparent intendment that his interest in each property should be the same. (*n*)

A devise to A (simply), provided that if he *or his heirs* alien the

[(*i*) Doe d. Atkinson *v.* Fawcett, 3 C. B. 274; Montgomery *v.* Montgomery, 3 Jo. & Lat. 47; Green *v.* Marsden, 1 Drew. 646, 653; Manning *v.* Taylor, L. R., 1 Ex. 235; but see Middleton *v.* Swain, *post* p. *286.]

9. See note 5, *supra*.

[(*k*) In re Arnold's Estate, 33 Beav. 163; and see Key *v.* Key, stated *sup.* p. *282.

(*l*) Woodward *v.* Glassbrook, 2 Vern. 388; Pettywood *v.* Cook, Cro. Eliz. 52; Sturgis *v.* Dunn, 19 Beav. 135; Doe d. Orpe *v.* Frost, 2 D. & Ry. 678, 1 B. & Cr. 638. In the last case, the fee was held to pass under other words. And in Bentley *v.* Oldfield, 19 Beav. 225, the fee passed by the words "share of *property*."

(*m*) Doe d. Knott *v.* Lawton, 6 Scott 303, 4 Bing. N. C. 455. And see Bennett *v.* Bennett, 2 Dr. & Sm. 273; Hill *v.* Rattey, 2 J. & H. 634 (annuity, perpetual or for life.)

(*n*) Green *v.* Armsteed, Hob. 65; cf. Doe d. Payne *v.* Plyer, 14 Jur. 326, 19 L. J., Q. B. 29

devise shall be void, confers a fee by force of the words of the condition, though the condition itself is void. (o)

By force of clause against alienation.

It may here be added, that a devise of a "perpetual advowson," (p) or of a "manor" (q) to A, conferred only a life estate, those words, like the words "lands," "hereditaments," &c., being considered descriptive of the subject of devise, and not of the entire interest in it. So a devise of a share in the New River Company (which is a freehold of inheritance) to A, has been held to confer only a life estate. (r)

"Perpetual advowson."

Manor.

"Share" in a company.

In conclusion, it may be noticed that where copyholds of a manor, in which there is no custom to entail, are devised in terms which, if applied to freeholds, would create an estate tail, the devisee takes a fee simple conditional, which becomes absolute on the birth of issue inheritable under the limitation, (s) and the same rule applies to a similar gift of a personal inheritance; which cannot be entailed.] (t)

Fee simple conditional in lands not within stat. *de donis.*

Or in a personal inheritance.

V.—Perhaps there was no one of the old rules of testamentary construction which so directly clashed with popular views as that which required words of limitation or some equivalent expression to pass the inheritance; and hence the attention of the framer of the act of 1 Vict., c. 26, was naturally directed to the abolition of this technical doctrine. Accordingly, by § 28 it is enacted, "That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or in*terest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will." 10

Effect of stat. 1 Vict., c. 26, § 28.

A devise without words of limitation, to pass the fee.

(o) Shailard *v.* Baker, Cro. Eliz. 744. See also Shaw *v.* Ford, 7 Ch. D. 669.

(p) Pocock *v.* Bishop of Lincoln, 3 Br. & B. 27. The word "living" is ambiguous, and may mean the whole advowson, either in fee or for life, or only the next presentation, according to the context, Webb *v.* Byng, 2 K. & J. 669.

(q) Paice *v.* Archbishop of Canterbury, 14 Ves. 364.

(r) Middleton *v.* Swain, Skinn. 339.

(s) Doe d. Simpson *v.* Simpson, 4 Bing. N. C. 333, 5 Scott 770; Doe d. Blesard *v.* Simpson, 3 Scott N. R. 774, 3 M. & Gr. 929; Doe d. Spencer *v.* Clarke, 5 B. & Ald. 458.

(t) Stafford *v.* Buckley, 2 Ves. 170; Turner *v.* Turner, 1 B. C. C. 316.]

10. Similar statutes have been enacted in most, if not all, of the states, and the rule which requires words of perpetuity to constitute a devise in fee is thereby abrogated in such states. This is the case in Alabama (Code 1876, § 2178); Illinois

Remarks on new rule.

The effect of the enactment, it will be observed, is not wholly to preclude, with respect to wills made or republished since the year 1837, the question whether an estate in fee will pass without words of limitatiom, but merely to reverse the rule. Formerly, nothing more than an estate for life would pass by an indefinite devise, unless a contrary intention could be gathered from the context. Now, an estate in fee will pass by such a devise, "unless a contrary intention shall appear by the will." The *onus probandi* (so to speak) will, under the new law, lie on those who contend for the restricted construction; [and will not be discharged by showing that another devise in the will contains formal words of limitation, (*u*) or that a special power of appointment is (in terms) given to the devisee; (*x*) though if the same land be given in one part of the will to A, and in another to B, the presence of words of limitation in the latter gift, and their absence from the former, are material to correct the apparent contradiction, and to show that the testator meant a gift to A for life, with remainder to B in fee.] (*y*) Indeed the restricted construction rarely accords with the actual intention of a testator, and it will probably not often occur that the courts will be called on to apply the

(Rev. Stats. 1877, ch. 30, § 13); Indiana (1858, Rev. Stats. 1876, p. 364, § 14); Iowa (Code 1873, §§ 1929, 1930); Kansas (Gen. Stats. 1877, ch. 117, § 54); Kentucky (Gen. Stats. 1877, ch. 63, § 7); Maine (Rev. Stats. 1871, ch. 74, § 16); Maryland (Code 1860, art. 93, § 305); Massachusetts (Gen. Stats., ch. 92, § 5); Minnesota (Stats. at Large 1873, ch. 35, § 2); Michigan (Comp. L. 1872, § 4323); Mississippi (Rev. Code 1871, § 2285); Missouri (Wagn. Rev. Stats. 1873, ch. 145, § 45); New Hampshire (Gen. L. 1878, ch. 193, § 4); New Jersey (Rev. Stats. 1877, vol. II., p. 300, A. D. 1784); New York (1 Rev. Stats. 748, § 1); North Carolina (Rev. Stats. 1873, ch. 119, § 45); Ohio (Rev. Stats., S. and C., ch. 123, § 55); Pennsylvania (1833, Purdon's Dig., p. 1475); Rhode Island (Gen. Stats. 1872, ch. 171, § 5); South Carolina (1824, Rev. Stats. 1873, ch. 86, § 9); Tennessee (Code 1858, § 2006); Texas (Pasch. Dig., art. 999, "Conveyances"); Vermont (Gen. Stats. 1870, ch. 49, § 3); Virginia (Code 1873, ch. 112, § 8); West Virginia (Code 1868, ch. 71, § 8); Wisconsin (Rev. Stats. 1872, ch. 97, § 2.) See also McConnell *v.* Smith, 23 Ill. 611; Smith *v.* Meiser, 51 Ind. 419; Hall *v.* Goodwyn, 4 McCord 442; Peyton *v.* Smith, Id. 476; Pell *v.* Ball, Speers Eq. 518; Newton *v.* Griffith, 1 Harr. & G. 111, 138, note (*a*).

[(*u*) Wisden *v.* Wisden, 2 Sm. & Gif. 396.

(*x*) Brook *v.* Brook, 3 Sm. & Gif. 280. See also Weale *v.* Ollive, 32 Beav. 421; and as to personalty In re Mortlock's Trusts, 3 K. & J. 456. Where the prior devise is expressly for life the question whether the further words give the absolute interest or only a power is the same as before the act, Freeland *v.* Pearson, L. R., 3 Eq. 658; Pennock *v.* Pennock, L. R., 13 Eq. 144.

(*y*) Gravenor *v.* Watkins, L. R., 6 C. P. 500. But for the words of limitation A and B would be joint tenants, vol. I., p. *476.

proviso which saves the effect of a restrictive context; so that there seems no reason to apprehend that the newly-enacted rule will be so prolific of qualifications and exceptions as the doctrine which it has superseded. Upon the whole, the enlargement of the operation of an indefinite devise may be regarded as one of the most salutary of the new canons of interpretation which have emanated from the legislature.

New rule does not apply to interests created *de novo*.

[This new rule of construction has been held not to apply to interests created *de novo;* thus a devise of a rent-charge to A simply, has been held to give him a rent-charge for life only. (*z*) And where a testator devised to A "the house she *lives in and grass for a cow in G. field," and gave his D. estate (which included G. field) to X., it was held that A took the fee simple in the house, but not in the easement; the court being of opinion that grass for a cow was not necessary for the enjoyment of the house, and that the extent of interest in the one was not governed by the other.] (*a*)

(*z*) Nichols *v.* Hawkes, 10 Hare 342. As to what words are sufficient to create a perpetual rent-charge, see Mansergh *v.* Campbell, 25 Beav. 544, 3 De G. & Jo. 232.

(*a*) Reay *v.* Rawlinson, 29 Beav. 88. As to the construction where property is devised to one in fee, and there follows an indefinite gift of an easement which is *necessary* to its enjoyment, see Pym *v.* Harrison, 32 L. T. (N. S.) 817, revd. 33 Id. 796 (will before 1838).]

*CHAPTER XXXIV.

ESTATES OF TRUSTEES.

Whether devises are within the statute of uses.

The question whether a devise to uses operates by virtue of the statutes of wills alone, or by force of those statutes concurrently with the statute of uses,[1] has been the subject of much learned controversy. (*a*) The prevailing, and, it is conceived, the better opinion is in favor of the latter hypothesis; (*b*) the only objection to which seems to be, that, as the statute of uses preceded the statutes of wills, uses created under the testamentary power conferred by the latter statutes could not, at the time of the passing of the statute of uses, have been in the contemplation of the legislature. The futility of this objection has been so often exposed, that it is not intended here to revive the discussion, more especially as the point has not, in general, any practical influence on the construction of wills; for even those who assert that the statute of uses does not apply, admit, and the authorities conclusively show, (*c*) that a devise to A and his heirs, simply to the use of B and his heirs, would vest the fee simple in B, if not by force of the statute, yet in order to give effect to the manifest intention of the testator. Such intention, however, seems to be apparent only when examined through the medium of the statute of uses. We must suppose the testator to be acquainted with the effect of that statute, in order to gather from such a devise an intention to confer the legal estate on the ulterior devisee. On the other hand, it is clear that a devise to the use of A and

1. Judge Stewart, in his note to De Camp *v.* Dobbins, 2 Stew. (N. J.) 43, cites the following authorities as to the continuing force of the statute of uses in the United States: 1 Greenl. Cruise 340, note; Croxall *v.* Sherrerd, 5 Wall. 268; Society *v.* Hartford, 2 Paine C. C. 536; Matthews *v.* Ward, 10 Gill & J. 443; Thompson *v.* Gibson, 1 Ohio 439. See also ch. IX., note 1, as to the force of English statutes. To the effect that the statute of uses is not in force in Ohio, see Helfenstein *v.* Garrard, 7 Ohio 275.

(*a*) 1 Sand. Uses 195; 2 Fonbl. Treat. Eq. 24; and Sugd. Pow. (8th ed.) 146.

[(*b*) But, *contra*, per Jessel, M. R., L. R., 20 Eq. 171, 3 Ch. D. 400.]

(*c*) Symson *v.* Turner, 1 Eq. Cas. Ab. 383, pl. 1, n.; Harris *v.* Pugh, 4 Bing. 335, 12 J. B. Moo. 577. And see Hawkings *v.* Luscombe, 2 Sw. 392; Doe *v.* Field, 2 B. & Ad. 564.

his heirs, in trust for or for the use of B and his heirs, would vest the legal inheritance in A in trust for B, and not carry it on to B. Either this must be by the effect of the statute of uses *forbidding the limitation of a use upon a use, or, supposing that statute not to operate upon wills, it must be (as in the former case) the result of presuming the testator to intend by the devise in question to produce the same effect as such limitation introduced into a deed would have done by force of that statute. It is evident, therefore, that in such cases the question whether the statute of uses applies to wills does not arise. And in practice little or no attention seems to have been paid to the difficulty suggested by an eminent writer, (*d*) that, under a devise to A and his heirs, to the use of B and his heirs, if A should die in the testator's lifetime, the devise to B might possibly, under the statute of uses, fail at law for want of a seisin to serve the use. Indeed, the writer in question himself observes, in solution of his own difficulty, that, as every testator has a power to raise uses either by the joint operation of both statutes, or by force of the statute of wills only, possibly the courts would, in favor of the intention, construe the devise as a disposition not affected by the statute of uses, but as giving the fee to B immediately. Perhaps, however, there would be some difficulty, in principle, in adopting this construction; for, if, in the event of A surviving the testator, the use would have been executed by the operation of the statute of uses, to hold the result to be different in consequence of the death of A in the lifetime of the testator would be to make the construction of the devise dependent on events subsequent to its inception. Supposing the devise to be void at law, it is clear that equity would compel the heir to convey; but probably the courts would struggle hard against adopting a construction which would invalidate it even at law. The occurrence of the question may of course be easily avoided by devising the estate immediately to uses, and not to a devisee to uses. (*e*)

Principle which determines whether persons, apparently so, are trustees.

Where property, in which a testator has an estate of freehold, is devised to one person in trust for or for the benefit of another, the question necessarily arises whether the legal estate remains in the first-named person, or passes over to, and becomes vested in, the beneficial or ulterior devisee.

[(*d*) Butl. Co. Lit. 272, a, VIII., 1;] and 1 Sugd. Pow. (7th ed.) 173, [but omitted, 8th. ed. 148.]

(*e*) See further on this subject, Sugd. Pow. (8th ed.) 148, where it is shown that an important question on the construction of powers created by will depends upon this point.

If the devise is to the use of A, in trust for B, the legal estate (we have seen) is vested in A, even though no duty may have been assigned to him which requires that he should have the estate. Where, *however, the property is devised to A and his heirs, to the use of, or in trust for, B and his heirs, the question whether A does or does not take the legal estate depends chiefly on the fact whether the testator has imposed upon him any trust or duty the performance of which requires that the estate should be vested in him.[2] If he has not, the

2. In the absence of words of limitation or perpetuity, the trustee will take an estate commensurate with the purposes of the trust, and no more, Ward *v.* Amory, 1 Curt. C. C. 419; Comby *v.* McMichael, 19 Ala. 747; Powell *v.* Glenn, 21 Ala. 458; Smith *v.* Dunwoody, 19 Ga. 238; Coulter *v.* Roberson, 24 Miss. 278; Manice *v.* Manice, 43 N. Y. 303; Nicoll *v.* Walworth, 4 Denio 385; Peck *v.* Brown, 2 Rob. (N. Y.) 133; Norton *v.* Norton, 2 Sandf. 296; Payne *v.* Sale, 2 Dev. & Bat. Eq. 455; Smith *v.* Metcalf, 1 Head 64; Ellis *v.* Fisher, 3 Sneed (Tenn.) 231; Cutter *v.* Hardy, 48 Cal. 568; Mack *v.* Mulcahy, 47 Ind. 68; Williman *v.* Holmes, 4 Rich. Eq. 475; Posey *v.* Cook, 1 Hill (S. C.) 413; Webster *v.* Cooper, 14 How. 488. And where necessary for the object of the trust, the trustee will take a fee, Korn *v.* Cutler, 26 Conn. 4; Stockbridge *v.* Stockbridge, 99 Mass. 244; Cleveland *v.* Hallet, 6 Cush. 404; Att.-Gen. *v.* Meeting House, &c., 3 Gray 48; Easterbrooke *v.* Tillinghast, 5 Gray 21; Wells *v.* Heath, 10 Gray 25; King *v.* Parker, 9 Cush. 81; Sears *v.* Russell, 8 Gray 89; Fisher *v.* Fields, 10 Johns. 505; Welch *v.* Allen, 21 Wend. 147; Morton *v.* Barrett, 22 Me. 257; Deering *v.* Adams, 37 Id. 264. So in general by statute in Kentucky, Gill *v.* Logan, 11 B. Mon. 231.

A passive trust or use, where the trustee has no active duty imposed on him, is executed by the statute of uses, Bowman *v.* Long, 26 Ga. 142; Simonds *v.* Simonds, 112 Mass. 157; Tappan's Appeal, 55 N. H. 317; Kay *v.* Scates, 37 Penna. St. 31; Ogden's Appeal, 70 Id. 501; Witham *v.* Brooner, 63 Ill. 344; Riehl *v.* Bingenheimer, 28 Wis. 84; Williman *v.* Holmes, 4 Rich. Eq. 475; Escheator *v.* Smith, 4 McCord 452; Ioor *v.* Hodges, 1 Speers Eq. 593, 596. But the statute of uses, in Virginia, does not apply to uses created by devise, so as to transfer such uses into the possession of the *cestui que use*, Bass *v.* Scott, 2 Leigh 356; Jones *v.* Tatum, 19 Gratt. 720. But personalty is not within the statute of uses, and the title to such property cannot be affected by the operation of that statute, Denton *v.* Denton, 17 Md. 403; Slevin *v.* Brown, 32 Mo. 176; Rice *ads.* Burnett, 1 Speers Eq. 579; Ioor *v.* Hodges, *ubi supra.* So a trust to convey to another is executed by the statute of uses, Adams *v.* Guerard, 29 Ga. 651; Adams *v.* Perry, 43 N. Y. 487; Bacon's Appeal, 57 Penna. St. 504; Westcott *v.* Edmunds, 68 Id. 36; or to permit another to occupy and receive rents, Upham *v.* Varney, 15 N. H. 462; but not a trust to lease, collect rents, invest and pay over, Barnett's Appeal, 46 Penna. St. 392 (overruling Kuhn *v.* Newman, 26 Id. 227); Shankland's Appeal, 47 Id. 113; Craige *v.* Craige, 9 Phila. 545; nor a trust for separate use against creditors, Rife *v.* Geyer, 59 Penna. St. 396; nor, in South Carolina, a devise to trustees, for the sole and separate use of a married woman, Williman *v.* Holmes, 4 Rich. Eq. 475; Escheator *v.* Smith, 4 McCord 452. Nor will the statute execute the trust in case there is some duty to be performed or act to be done by the trustee necessary to the scheme of the trust, and for the performance of which it

legal ownership passes to the beneficial devisee, and the first-named person is regarded as a mere devisee to uses, filling the same passive office as a releasee to uses in an ordinary conveyance by lease and release. And the fact that the testator, in a series of limitations, employs sometimes the word *use*, and sometimes the word *trust*, is not considered to indicate that he had a different intention in the respective cases. 3

Words *use* and *trust* used indifferently.

Thus, where (*f*) a testator devised lands to A and his heirs, in trust and for the several uses and purposes after mentioned, viz., to pay the rents to certain persons for the life of B, and after her decease *to the use* of C and D during their lives and the life of the longest liver, remainder to the use of A and his heirs during the lives of C and D and the life of the longest liver, to preserve contingent remainders; and after the several deceases of C and D, then *in trust* for the heirs male of the bodies of C and D; remainder to the use of T. in fee. After B's death, C and D suffered a recovery, which it was contended was void, on the ground that the limitation to the heirs male of their bodies was equitable, and therefore did not make them tenants in tail (a point which is discussed in a future chapter); but Lord Ellenborough observed, that the testator employed the words

is necessary that the legal estate should not pass from the trustee by operation of the statute, Williman *v.* Holmes, *ubi supra;* Escheator *v.* Smith, *ubi supra;* Ioor *v.* Hodges, *ubi supra.* "Perhaps the rule might be more accurately expressed to say, that where the intention is, that the estate shall not be executed in the *cestui que use*, and any object is to be effected by its remaining in the trustees, there it shall not be executed." Per Harper, J., in Posey *v.* Cook, 1 Hill (S. C.) 413, 414. A trust for charities has been held not to be a use which is executed by the statute and the trustees take the estate, Exeter *v.* Odiorne, 1 N. H. 232. And the statute of uses will not execute a trust for a class of persons (*e. g.*, children to be born) until the class is complete, Brady *v.* Walters, 55 Ga. 25.

Where Y. devised to his wife as follows: "All my estate, real, personal and mixed, to be managed by her, (and that she may be enabled the better to control and manage our children) to be disposed of by her to them, in that manner she may think best for their good and her own happiness," it was held to be a gift to the wife in trust, for neither herself nor the children alone, but for both. Young *v.* Young, 68 N. C. 309.

3. In Fisher *v.* Fields, 10 Johns. 506, Kent, C. J., says: "A trust is merely what a use was before the statute of uses. It is an interest resting in conscience and equity, and the same rules apply to trusts in chancery now which were formerly applied to uses." See also Perry on Trusts, §§ 6–8; Ware *v.* Richardson, 3 Md. 505, 547, where it is said by Mason, J.: "A trust therefore is a use not executed under the statute of Hen. VIII., in the *cestui que use*, but the legal estate is vested in the grantee or trustee."

(*f*) Doe d. Terry *v.* Collier, 11 East 377.

"use" and "trust" indifferently, and both were within the operation of the statute. (*g*)

Effect of changing language of limitations by introducing words of direct gift.

So, it is clear, that the mere change of language, in a series of limitations, by substituting words of direct gift to the persons taking the beneficial interest, for the phrase "in trust for," will not clothe such persons with the legal estate, if the purposes of the will, in any possible event, require that the legal estate should be in the trustees. (*h*)

But the courts are strongly inclined to give the devise such *a construction as will confer on the trustees estates co-extensive with those interests which are limited in the terms of trust estates, if the other parts of the will can by any means be made consistent.

Restrictive operation of words of direct gift.

Thus, where (*i*) the testator's real estate was devised to trustees, their survivors or survivor, and their or his heirs, &c., to secure a life annuity (which was to be paid out of the annual income), and then in trust for the testator's children, until they should attain twenty-one, "and then *unto* and among them, share and share alike, as tenants in common, and not as joint tenants;" and the will contained clauses empowering the trustees to grant leases of the estates, and, if they should think it advisable, to sell any part thereof, *at any time after his* (the testator's) *decease.* It was held, notwithstanding this expression, that the estate of the trustees was confined to the minority of the children, being so restricted by the express devise to them.

Devise of copyholds "to be transferred" to A at majority.

A devise of copyhold lands in trust for a minor, and *to be transferred* to him at twenty-one, has been held to give to the trustees a chattel interest only, determinable at the majority of the *cestui que trust;* the court thinking that the words "to be transferred," did not refer to a legal transfer of the estate by surrender (in which case the trustees must have taken the fee

(*g*) It is evident, therefore, that his lordship concurred in the doctrine that uses created by will are within the statute of uses.

(*h*) Doe d. Tomkyns *v.* Willan, 2 B. & Ald. 84; Murthwaite *v.* Jenkinson, 3 D. & Ryl. 765, 2 B. & Cr. 357. See also Sandford *v.* Irby, 3 B. & Ald. 654; [Blagrave *v.* Blagrave, 4 Ex. 550; Hodson *v.* Ball, 14 Sim. 558; Watson *v.* Pearson, 2 Ex. 581; Smith *v.* Smith, 11 C. B. (N. S.) 121; Collier *v.* Walters, L. R., 17 Eq. 252.]

(*i*) Doe d. Budden *v.* Harris, 2 D. & Ryl. 36. See also Goodtitle d. Haward *v.* Whitby, 1 Burr. 228; Edwards *v.* Symons, 6 Taunt. 212; Ackland *v.* Lutley, 1 Per. & D. 636, 9 Ad. & Ell. 879; [Tucker *v.* Johnson, 16 Sim. 341; Plenty *v.* West, 6 C. B. 201; Doe d. Kimber *v.* Cafe, 7 Ex. 675; Baker *v.* White, L. R., 20 Eq. 176.]

to enable them to make such surrender), but merely to the delivery of possession, and admission on the rolls of the manor. (*k*)

Where the person to whom the real estate is devised for the benefit of another is intrusted with the application of the rents, he must, according to the principle before laid down, take the legal estate, in order that he may have a command over the possession and income. [4]

Trustee takes legal estate, when directed to apply the rents;

In Shapland *v.* Smith, (*l*) the trust was out of the rents, after deducting rates, taxes, repairs and expenses, to pay such clear sum as remained to S. during his life, and after his death to the use of the heirs male of his body. The question was, whether the use for life was executed in S., who, if it were, was tenant in tail male, by force of the rule in Shelley's Case. (*m*) Eyre,

—or to pay taxes and repairs;

(*k*) Doe d. Player *v.* Nicholls, 1 B. & Cr. 336. [Cf. Maden *v.* Taylor, 45 L. J., Ch. 569.]

4. And a direction that the trustee hold the property, manage, receive rents, &c., gives him an estate, and not a mere power, Tay *v.* Taft, 12 Cush. 448; Leggett *v.* Perkins, 2 N. Y. 305; Wright *v.* Douglass, 7 N. Y. 564; Striker *v.* Mott, 28 N. Y. 89; Tobias *v.* Ketchum, 32 N. Y. 328; La Grange *v.* L'Amonieux, 1 Barb. Ch. 18; 1 N. Y. Rev. Stats. 727, § 47; Killam *v.* Allen, 52 Barb. 606; Shankland's Appeal, 47 Penna. St. 113; Cutter *v.* Hardy, 48 Cal. 568; Pearce *v.* Savage, 45 Me. 90; Mead *v.* Jennings, 46 Mo. 91; Ioor *v.* Hodges, 1 Speers Eq. 593, 597; or that he shall lease the property and collect and pay the income, Sears *v.* Russell, 8 Gray 89; Craig *v.* Craig, 3 Barb. Ch. 94; Wood *v.* Wood, 5 Paige 604; or that he shall receive the rents and profits and apply them to certain purposes, People *v.* Robinson, 29 Barb. 79; Killam *v.* Allen, *ubi supra;* but property devised to grandchildren subject to an annuity to testator's widow, the devisees not to come into possession until her death, and the executors meanwhile to rent, repair, insure and pay over the net proceeds, passes no estate to the executors, Tucker *v.* Tucker, 5 N. Y. 408; so, Barnes *v.* Hathaway, 66 Barb. 452; but see, *contra*, Brewster *v.* Striker, 1 E. D. Smith 321. A devise to executors in trust to pay debts and to pay the income, and, if insufficient, to sell the property, for the support of the widow, carries a fee simple, Hardy *v.* Redman, 3 Cranch C. C. 685. So a direction to executors, without a direct devise, to pay an annuity out of the income to the widow, to be increased in their discretion, Walker *v.* Whiting, 23 Pick. 313. There seems to be a distinction between a devise to a trustee *to collect and pay over* the rents and profits to another, and a devise to a trustee to permit another *to enjoy* the rents and profits, it being held that, in the first case, the use is executed in the trustee, in the latter, in the *cestui que use*, Ware *v.* Richardson, 3 Md. 505, 548. A trust to pay the income has been held not to carry an estate to the trustee, Keating *v.* Smith, 5 Cush. 234.

(*l*) 1 B. C. C. 74. See also Browne *v.* Ramsden, 2 J. B. Moo. 612; Tenny d. Gibbs *v.* Moody, 3 Bing. 3, 10 J. B. Moo. 252.

(*m*) The question whether the trustees take any and what estate is often raised in this manner. See Jones *v.* Lord Say & Sele, 8 Vin. Ab. 262, pl. 19, 1 Eq. Cas.

B., *sitting for Lord Thurlow, thought there was no difference between a trust to pay the rents to a person, and a trust to permit him to receive them (see *contra* in the sequel), and, therefore, that the use in this case was vested in S.; but Lord Thurlow, on resuming his seat, determined that as the trustees were to pay taxes and repairs, the legal estate during the life of S. was in them.

—or to apply rents for maintenance of *cestui que trust;*

In Silvester *v.* Wilson (*n*) the testator devised that the trustees should yearly during the life of his son J. W. receive the rents; and he ordered that they should be applied for the maintenance of the said J. W. The court thought that it was intended that the trustees should have a sort of discretion in the application of the money, and, therefore, that they took the legal estate [during the life of J. W.]

Indeed, without regard to the exact degree of discretionary power lodged in the trustees, the mere fact that they are made agents in the application of the rents is sufficient to give them the legal estate, as in the case of a simple devise to A upon trust to pay the rents to B. And it is immaterial in such a case that there is no direct devise to the trustees, if the intention that they shall take the estate can be collected from the will. Hence a devise to the intent that A shall re-

—or to pay rents to a person.

ceive the rents and pay them over to B would clearly vest the legal estate in A. (*o*)

To permit receipt of rents, gives trustee no estate.

But where real estate is devised to one person upon trust to permit and suffer another to receive the rents, the beneficial devisee takes the legal estate and not the trustee. (*p*) The distinction between a direction to pay the rents to a person, and a direction to permit him to receive them, though often condemned, cannot now be questioned. In Doe d. Leicester *v.* Biggs, (*q*) Sir James Mansfield said it was miraculous how it came to be established, since good sense requires in each case that it should be equally a trust, and that the estate should be executed in the

Abr. 383, pl. 4, [as to which case see per Lawrence, J., 5 East 167, Fearne C. R. 54, n. by Butler]; Silvester d. Law *v.* Wilson, 2 T. R. 444; Curtis *v.* Price, 12 Ves. 89; Wykham *v.* Wykham, 18 Ves. 395; Biscoe *v.* Perkins, 1 Ves. & B. 485; [Adams *v.* Adams, 6 Q. B. 860; Collier *v.* Walters, L. R., 17 Eq. 252.]

(*n*) 2 T. R. 444. See also Doe *v.* Ironmonger, 3 East 533; [Reynell *v.* Reynell, 10 Beav. 21; Berry *v.* Berry, 7 Ch. D. 657; and see Plenty *v.* West, 6 C. B. 201.]

(*o*) Doe *v.* Homfray, 6 Ad. & Ell. 206. See also cases cited *post* p. *305.

(*p*) Right d. Phillips *v.* Smith, 12 East 455; [Doe d. Noble *v.* Bolton, 11 Ad. & Ell. 188;] but see Gregory *v.* Henderson, 4 Taunt. 772, *post* *294.

(*q*) 2 Taunt. 109; [and see 1 Ed. 36, n., and 1 B. C. C., by Eden, 75, n.]

trustee; for how could a man be said to permit *and suffer who has no estate and no power to hinder the *cestui que trust* from receiving?

Effect where both expressions are used.

Where the expressions to *pay unto* and *permit and suffer to receive* are both used, it seems that the construction will (in conformity to a rule discussed in a preceding chapter, (*r*) be governed by the posterior expression. Thus, in Doe d. Leicester *v.* Biggs, (*s*) where the trust was "to pay unto or permit and suffer A to receive the rents," it was held that the words "permit and suffer," coming last, controlled the former trust, "to pay," and consequently that the estate was vested in A. (*t*)

Trust to permit receipt, with other active duties;

In the proposition that a devise to a person upon trust to permit another to receive the rents, vests the legal estate in the latter, it is assumed that no duty is imposed on the trustee, either expressly or by implication, requiring that he should have the estate, for in such case it is clear the trustees will take the legal estate.

—as, to preserve contingent remainders;

Thus, in Biscoe *v.* Perkins, (*u*) where a testator devised his real estate to his executors, their heirs, &c., for the life of his son A, to the intent to support the contingent remainders after limited, but in trust, nevertheless, to permit and suffer his said son to receive the rents for his own use during his natural life; and after his decease the testator devised the same to the first son of A in tail. Lord Eldon held that A did not take the legal estate, as the purpose of preserving the contingent remainders required that it should be in the trustees. 5

—to secure separate use of *feme coverte*.

Upon the same principle, it has been often decided that a trust to permit a *feme coverte* to receive the rents for her separate use, vests the estate in the trustees. (*x*) 6

(*r*) Ch. XV.

(*s*) 2 Taunt. 109; [so in Baker *v.* White, L. R., 20 Eq. 166.]

(*t*) But might not the alternative terms of the devise in such a case have been considered as giving the trustees an option? This would have avoided the repugnancy.

(*u*) 1 Ves. & B. 485. See also White *v.* Parker, 1 Bing. N. C. 573, 1 Scott 542.

5. A trust to preserve contingent remainders is not executed by the statute of uses, Vanderheyden *v.* Crandall, 2 Denio 9.

(*x*) Harton *v.* Harton, 7 T. R. 652; Doe d. Woodcock *v.* Barthrop, 5 Taunt. 382. See also Doe d. Stephens *v.* Scott, 4 Bing. 505, 1 M. & Pay. 317; *a fortiori*, where the direction is to pay them to her, Nevil *v.* Sanders, 1 Vern. 415, 1 Eq. Cas. Ab. 382, pl. 1; Robinson *v.* Grey, 9 East 1; Hawkins *v.* Luscombe, 2 Sw. 375; [and see Toller *v.* Attwood, 15 Q. B. 929; Plenty *v.* West, 6 C. B. 201; but as to a deed, see Williams *v.* Waters, 14 M. & Wels. 166.]

6. A trust for the separate use of a married woman ends with her coverture, upon her death, Comby *v.* McMichael, 19

And where (*y*) a trust to permit and suffer the testator's wife to receive the rents during her widowhood was followed by a direction, that her receipts, *with the approbation of any one of his trustees*, should be good; it was held that the legal estate *was vested in the trustees, it being clearly intended that they should exercise a control.*

Receipts with the approbation of trustees to be good.

And a similar construction was given to a direction that the trustees should permit the beneficial devisee to receive the *net* rents and profits; this term being used, it was thought, in contradistinction to the *gross* profits, which were intended to be received by the trustees, and the surplus paid over to the person beneficially entitled, both purposes evidently requiring that the trustees should have an estate. (*z*)

To permit A to receive *net* rents.

Where the duty imposed on the devisee is to sell or convey (*a*) the fee simple, he is held to take the inheritance to enable him to comply with the direction; though in such a case it is too much to affirm that the testator's intention cannot in any other manner be effected; for, by means of a power, the trustee might be

Direction to sell or convey.

Ala. 747; Powell *v.* Glenn, 21 Ala. 458; Greenwood *v.* Coleman, 34 Ala. 150; Richardson *v.* Stodder, 100 Mass. 528; Norton *v.* Norton, 2 Sandf. 296; Payne *v.* Sale, 2 Dev. & Bat. Eq. 455; Edmund's Appeal, 68 Penna. St. 24; or upon the death of her husband, Waring *v.* Waring, 10 B. Mon. 331; Frazer *v.* Western, 1 Barb. Ch. 220; Kay *v.* Scates, 37 Penna. St. 31; Steacy *v.* Rice, 27 Id. 81; Koenig's Appeal, 57 Id. 352; Tucker's Appeal, 75 Id. 354; Dodson *v.* Ball, 60 Id. 493; Williams' Appeal, 83 Id. 377. So a trust to pay the income to her until she arrive at the age of twenty-one, and then convey to her, or, on her death before that time, to her issue, terminates on her death, Beeckman *v.* Schermerhorn, 3 Sandf. Ch. 184; Bacon's Appeal, 57 Penna. St. 504; so a trust for a son, "and after him in fee for his heirs," Thurston *v.* Thurston, 6 R. I. 299; but not a trust to pay income to her "and her heirs," Harlow *v.* Cowdrey, 109 Mass. 183. But where the legal title is vested in a trustee for the wife, her death will not operate to prevent the trustee from recovering the property in ejectment. The title will still remain in the trustee, Slevin *v.* Brown, 32 Mo. 176. But it seems to be clear that where a trustee is interposed to protect and secure a trust estate in a married woman, that act alone will not prevent the execution of the use in the *cestui que use*, unless there be imposed upon the trustee the performance of some active duty for the purpose of supporting the trust, Ware *v.* Richardson, 3 Md. 505, 548. As to provisions of the revised code of North Carolina, providing that such trust vest the fee in the married woman, see Levy *v.* Griffis, 65 N. C. 236.

(*y*) Gregory *v.* Henderson, 4 Taunt. 772, which compare with Broughton *v.* Langley, Salk. 679, 2 Ld. Raym. 873, 1 Lutw. 823.

(*z*) Barker *v.* Greenwood, 4 M. & Wels. 421.

(*a*) Garth *v.* Baldwin, 2 Ves. 646; Doe d. Booth *v.* Field, 2 B. & Ad. 564; Doe d. Shelley *v.* Edlin, 4 Ad. & Ell. 582.

authorized to convey without himself having an estate. It seems to be a more reasonable conclusion, however, that the testator, by devising the property to the person who is directed to make the conveyance or sale, intended not merely to make him the medium or instrument through which to vest the estate in the beneficial devisee, but that he should take an estate commensurate with the duty which was assigned to him; and the ground for this construction is obviously strengthened, when there are other purposes requiring that the trustee should have *some* estate. [7]

In Bagshaw *v.* Spencer (*b*) a devise to trustees and their heirs, upon trust out of the rents or by sale or mortgage to raise so much as should

7. A devise of land to executors to sell carries an estate, but not a devise that they sell, which is a naked power, Fay *v.* Fay, 1 Cush. 93; Jackson *v.* Burr, 9 Johns. 104; Bergen *v.* Bennett, 1 Caines Cas. 16; Jackson *v.* Scauber, 7 Cow. 187; De Peyster *v.* Clendining, 8 Paige 295; Ferebee *v.* Proctor, 2 Dev. & Bat. 439; Thompson *v.* Schenck, 16 Ind. 194; nor where the property is devised to others with a naked power to executors to sell, Martin *v.* Martin, 43 Barb. 184; Doe *v.* Lanius, 3 Ind. 441; Clinefelter *v.* Ayres, 16 Ill. 329; nor will a mere power to divide the property carry an estate, Irving *v.* De Kay, 9 Paige 521: nor a declaration of trust to sell, Ford *v.* Belmont, 7 Rob. (N. Y.) 107. But a direction to sell and distribute the proceeds creates an estate in the executor as trustee, Greenough *v.* Wells, 10 Cush. 571; Gibbs *v.* Marsh, 2 Metc. 243; Duke of Cumberland *v.* Graves, 9 Barb. 595; while a devise to executors to pay debts and funeral expenses with a power of sale, if testator survive his wife, is construed to be a power without an interest, Dunshee *v.* Goldbacker, 56 Barb. 579; or on condition that they sell and pay certain debts, legacies and annuities, Vernon *v.* Vernon, 7 Lans. 503. "Where a power is given, and no person or interest is made to arise or depend upon its exercise, other than it creates by its exercise, it is a naked power." Scates, J., in Clinefelter *v.* Ayres, 16 Ill. 329, 332. In such case the trustee takes no estate, Ib. A devise with power to convey a fee carries an estate in fee; but it is only a life estate, if the power is only to devise in fee and there are no words of inheritance, Doe *v.* Howland, 8 Cow. 277. See last preceding chapter and notes. It is said by Frazer, J., in Rubottom *v.* Morrow, 24 Ind. 202, 204: "The law is too well settled for controversy, that real estate, unless otherwise disposed of, goes to the heirs, and not to the executors, and that a mere power given to the executor to sell real estate, does not give him a right to the possession thereof; that to entitle him to such possession, the land or its usufruct, must be expressly, or by necessary implication, given to him by the will."

(*b*) 1 Ves. 142, 2 Atk. 570. See also Gibson *v.* Rogers, Amb. 93; Sanford *v.* Irby, 3 B. & Ald. 654; [Watson *v.* Pearson, 2 Ex. 581; Blagrave *v.* Blagrave, 4 Ex. 550; Reynell *v.* Reynell, 10 Beav. 21; Rackham *v.* Siddall, 1 M. & Gord. 607, 2 H. & Tw. 44; Doe d. Noble *v.* Bolton, 11 Ad. & Ell. 188; Underhill *v.* Roden, 2 Ch. D. 499]; but see Hawker *v.* Hawker, 3 B. & Ald. 537. [A direction to convey without any words of devise gives a power only, Doe *v.* Shotter, 8 Ad. & Ell. 905; Queen *v.* Wilson, 3 B. & S. 201 (copyhold): so a direction to settle, Knocker *v.* Bunbury, 6 Bing. (N. S.) 306, 8 Scott 414.]

be sufficient for the payment of debts, legacies and funeral expenses, and then as to one moiety upon trust for and to the use of B for life, remainder to trustees to preserve contingent uses, &c., was held by Lord Hardwicke to vest the fee in the trustees, as they were "to sell the lands" by virtue of their estate.

Remark on Bagshaw v. Spencer.

In this case the testator evidently intended the trustees to *take the inheritance, as they were to raise the money either out of the rents, or by sale or mortgage of the estate, and the former purpose could not be answered by a mere power; though it is observable that the construction adopted by the court rendered nugatory the [remainder in] trust for preserving contingent remainders.

"In trust and to be conveyed accordingly."

[Even a devise to trustees and their heirs, in trust for several persons as tenants in common for life, and afterwards for their children, and if any tenant for life should die without issue (*i. e.*, such issue, viz., children), then his share to "go to the survivor or survivors of them and their heirs, and to be conveyed and assured to them and their heirs accordingly," was held to give them the fee simple to enable them to *convey* in the event mentioned. (*c*)

But a formal devise to trustees in fee to successive uses in settlement (with a limitation to the trustees after each life estate to preserve contingent remainders) will not give the legal fee to the trustees (thereby converting all the uses into equitable interests) merely because the will contains a power authorizing them to "*convey* in exchange or on partition," although there are contingent remainders which in the result are not effectually preserved.] (*d*)

Lands being charged with debts and legacies will not vest the estate in the trustees.

The mere fact, that the devised property is charged with debts or legacies, will not vest the legal estate in the trustees, unless they are directed to pay them, or the will contains some other indication of an intention to create a trust for the purpose.

Thus, where (*e*) the testator, as to his real and personal estate, subject to his debts, legacies and funeral expenses, devised the same as follows, that is to say: unto M. and W. and their heirs, upon trust and to and for the several uses, &c., following, that is to say: to the

[(*c*) Maden *v.* Taylor, 45 L. J., Ch. 569. Cf. Doe *v.* Nicholls, 1 B. & Cr. 336, *ante* p. *292.

(*d*) Cunliffe *v.* Brancker, 3 Ch. D. 393.]

(*e*) Kenrick *v.* Lord Beauclerk, 3 B. & P. 178.

intent that they the said M. and W. or the survivor of them or the heirs, executors and administrators of such survivor should in the first place apply the testator's personal estate in discharge of debts, funeral expenses and such legacies as he might direct; and as to his real estates, subject to his debts and such charges as he might then or thereafter think proper to make, he gave and devised the same unto P. for his life, with remainders over. The court held that the estate was executed *in P. for his life. Lord Alvanley, C. J., said, "Unless it appeared manifestly that the testator intended that the trustees should be active in paying the debts, the legal estate would not vest in them. The question was, whether there were such apparent intention on the face of this will. It would, indeed, be much more convenient that the legal estate should be vested in trustees for the payment of the debts, than that the trust should be executed by the devisee under the direction of a court of equity; for a court of equity could not enable the devisee to make a complete title to the estate. (*f*) But this," he added, "was only an argument *ab inconvenienti*, from which we cannot construe the testator to have said what, in fact, he has not said."

[But if the testator has devised the land to the trustees in fee simple and has appointed them executors, and directed them to pay the debts which he has charged on the land, the legal estate in fee will vest in the trustees. (*g*) But a direction to pay debts will not enlarge an estate *pur autre vie*, given to trustees, to a fee simple.] (*h*)

To pay debts in aid of personalty.

Where *devise* is in terms contingent on personalty being insufficient.

Here, it may be observed, that where real estate is devised to trustees for the payment of debts and legacies, though the property becomes applicable only in case of the deficiency of the personal estate, the trustees take the legal estate [in fee] *instanter*, independently of the fact of the personalty proving deficient. (*i*) But it is otherwise where the devise is in terms made contingent on this event (the language of the will being, "*in case* my personal estate shall not be sufficient to pay debts, &c., then I devise, &c.") (*j*) But even

(*f*) This deficiency is now supplied by 1 Will. IV., c. 47, § 12, [13 and 14 Vict., c. 60, and 15 and 16 Vict., c. 55.

(*g*) Creaton *v.* Creaton, 3 Sm. & G. 386; Spence *v.* Spence, 12 C. B. (N. S.) 199; Smith *v.* Smith, 11 C. B. (N. S.) 121.

(*h*) Doe d. Müller *v.* Claridge, 6 C. B. 641; the estate of the trustees may have been restricted to the life on the principle of Bolton *v.* Bolton, L. R., 5 Ex. 145, *ante* p. *269.]

(*i*) Murthwaite *v.* Jenkinson, 2 B. & Cr. 357, 3 D. & Ry. 765. See also Doe *v.* Field, 2 B. & Ad. 564.

(*j*) Goodtitle d. Hart *v.* Knott, Cowp. 43.

in such case the trustees, on the happening of the contingency, take an absolute fee simple in the whole, which continues in them as to the residue of the property, after they have, by a sale of part, raised sufficient money to answer the charge. (*k*)

Where *trust* is contingent on that event.

In Hawker *v.* Hawker, (*l*) where an estate was made salable by trustees, in the event of the proceeds of another estate proving deficient [*which they did not*] to pay the testator's debts, it appears to have been considered, that having regard to the terms in which *the estate was given to the beneficial devisees in the event of its not being wanted (such devises being framed in the manner of regular and formal limitations of the legal estate, including one to trustees for preserving contingent remainders,) the trustees did not take the fee. As, however, the estate was in the first instance actually given to the trustees and their heirs, the point seems to have been one of great nicety and difficulty, and the propriety of the decision has been questioned by an eminent writer. (*m*)

Trustees held to take the fee, notwithstanding expressions apparently conferring a power only.

A different construction prevailed in Doe d. Cadogan *v.* Ewart, (*n*) where a testator devised to A, B and C, and the survivors or survivor of them and the heirs of such survivor, (*o*) all his real estate, charged with the payment of a life annuity and so much of his debts, legacies, funeral expenses, and the costs of proving his will, as his personal estate should not extend to, upon the trusts following: upon trust to pay the rents to his wife during widowhood, and after her decease or marriage again, upon trust to apply the rents for the maintenance of his daughter J. until she should attain twenty-five, and after her attaining that age, upon trust, charged as aforesaid, for her and her heirs and assigns; but in case she should die without leaving issue lawfully begotten, then the testator gave the said real estate to D and E, their heirs and assigns forever. And the testator ordained that the trustees, for the performance of his will, in order to raise money for the payment of his debts, funeral expenses and legacies, should, with all convenient speed after his decease, *in case* the residue of his personal

(*k*) Doe d. Cadogan *v.* Ewart, 7 Ad. & Ell. 636. [But here the trust only was contingent.]

(*l*) 3 B. & Ald. 537.

(*m*) Sugd. Pow. [(8th ed.) 111. See also per Jervis, C. J., Poad *v.* Watson, 6 Ell. & Bl. 619.]

(*n*) 7 Ad. & Ell. 636, 3 Nev. & P. 197. But see Doe *v.* Shotter, 8 Ad. & Ell. 905.

(*o*) These words make the trustees joint tenants for life, with a contingent remainder in fee to the survivor. See *ante* p. *251, n. (*b*).

estate should be insufficient for that purpose, *bargain and sell and alien in fee simple any part of his freehold lands before mentioned;* for the doing whereof he gave to his trustees and the survivors, &c., and the heirs, &c., full power and authority to grant, alien, bargain and sell, convey and assure the same premises or any part thereof to any person or persons and their heirs forever in fee simple, by all such lawful ways and means in the law as to them should seem fit. And the testator authorized the trustees and the survivors, &c., and the heirs, &c., to give receipts for the purchase money; and did commit the management of the estates and fortunes of his daughter to his trustees and executors until *she should attain twenty-five. The testator's widow died in his lifetime. *The personal estate proved insufficient to pay the debts,* and it was held that in this event the trustees took an absolute fee in the real estate, and not (as had been contended) a mere estate of freehold until the testator's daughter attained twenty-five, with a power to sell for the payment of debts and legacies: (*p*) [and further, that as the will did not confine the power to sell to so much as should be sufficient to pay the debts, and as there was no devise over of such parts as should remain unsold, the trustees retained the fee simple in the unsold part.

Although the court appeared to rely on the fact that the contingency mentioned in the trust had actually happened, the principle of their decision was that the fee originally devised to the trustees was to be cut down only if a less estate would (without reference to subsequent events) have *certainly* enabled them to fulfill all the trusts. (*q*) This principle has been frequently enunciated in later cases, (*r*) and would seem to make it immaterial whether the contingency mentioned in the trust, does or does not happen. And with regard to the trust not being confined to selling so much as should be sufficient to answer the charge, the mere possibility of the whole being required for the debts

Sale to be made during continuance of trusts.—(*p*) Sometimes a trust or a power of sale is to be exercised during the continuance of the trusts, and the question arises as to what is to be deemed a "continuance" thereof. It is clear that the mere fact of the estate being outstanding in the trustees by reason of their neglect to convey at the proper period does not prolong their power. Wood *v.* White, 2 Kee. 664; but as to this case, see 4 M. & Cr. 460.

[(*q*) 7 Ad. & Ell. 666, 667, citing Doe *v.* Edlin.

(*r*) See Poad *v.* Watson, 6 Ell. & Bl. 606; Maden *v.* Taylor, 45 L. J., Ch. 569 (trust to convey *in one event.*) This principle appears to have been overlooked in Ward *v.* Burbury, 18 Beav. 190; but that case has been said to stand alone, per Jessel, M. R., L. R., 17 Eq. 257.

was sufficient in Lord Hardwicke's opinion "to consider them as trustees throughout."] (s)

Authority to grant leases when it confers the fee.

An authority to grant leases of an indefinite duration has been in some cases considered to supply an argument for holding trustees to take the inheritance, scarcely less cogent than a direction to sell.

Doe d. Tomkyns v. Willan.

Thus in Doe d. Tomkyns v. Willan, (t) where a testator devised to trustees, their heirs, executors, administrators and assigns, all his real and personal estates, in trust to let the freehold estates *for any term they should think proper*, at the best improved yearly *rent, and to pay one-third of the rents of the freehold estates to the testator's wife for life, and to pay the rents of the other two-thirds, and, after the death of the wife, the remaining third to his daughter E. Longman for her separate use, and after her death the testator devised his freehold and two-thirds of his personal estate to his daughter's children, to be equally divided amongst them, and to be paid them at their respective ages of twenty-one years; and if his daughter died without leaving issue, then the testator devised his freehold estates to his wife for life, and after her death to his heir-at-law as if he had died intestate, it was contended that the trustees took an estate determinable at the decease of the daughter, when the purposes of the trusts were satisfied; and that the authority to make leases for any term conferred a power and was not a measure of their estate. It was held, however, that the trustees took the fee. Bayley, J.,-observed, "There are no words here which distinctly create a power in the trustees; and it seems to me, that when an estate is devised upon a trust, and the trustees are to demise for any term they think proper (although at the best improved rent), the true construction is, that they are to create a term out of their interest; and if so, they must have a reversion after that term entirely ceases." He next adverted to the trusts respecting the application of the rents during the lives of the testator's wife and daughter, and said, "Then comes a limitation to her (the daughter's) children, and it is said that that limitation gives to them the legal estate, and that in that part of the will there is a change of language which shows that at that

(s) Gibson v. Rogers, Amb. 95. A gift over of what might remain unsold, though relied on in some other cases (see Glover v. Monckton, 3 Bing. 13, presently noticed), would seem equally ineffectual as against this possibility.]

(t) 2 B. & Ald. 84.

period of time all the former purposes of the trust were to cease. The language there used is not so clear as to satisfy my mind that that was necessarily the intention of the testator. That the interest, if defeasible, would continue until the death of E. Longman and would not end when her first husband died, seems to me to receive some confirmation from this, that if E. Longman had no child by her first husband, the limitation to her children, as far as it regarded children by a future marriage, would have been a contingent remainder, and if the trustees did not take an interest co-extensive with her life, but one which might determine on the death of her first husband, that contingent remainder might have been defeated by the acts of E. Longman in her lifetime. (x) The estate, therefore, to the trustees seems necessary for the purpose of protecting the interests of the children; and, inas*much as the words 'to them and their heirs' are calculated to give them the fee, I am not prepared to say that they took less than the whole legal estate."

Indefinite power of leasing.

So, in Doe d. Keen v. Walbank, (y) where a testator devised lands to trustees and their heirs, upon trust to permit his daughter to enjoy the same and take the rents during her life, exclusively of her husband; and after her decease upon trust to the use of such child or children and for such estate as she, notwithstanding her coverture, should by any deed or will appoint; and for want of such appointment, then to the use of the heirs of her body: and for default of such issue, to his own right heirs forever. Then, after several other devises to the trustees in the like terms, the testator concluded thus: "And I hereby will, &c., that the said trustees and each of them shall, may and do in every respect give receipts, pay money and *demise the aforesaid premises* or any part thereof as shall be consistent with their duty and trust or otherwise." It was held that the trustees took the fee simple in the lands devised to them. Lord Tenterden, C. J., observed, in answer to the argument that the words might be held to confer a *power* of leasing, that the language of the clause was unlike that of any clause by which a leasing power had been given, and that it specified no limit or qualification as to duration, rent, or other matter, but seemed intended to authorize any lease that would not be considered in a court of equity as a violation of the duty of a trustee.

(x) As to this *vide post* p. *316. Garnett, 3 De G. & S. 629.]
(y) 2 B. & Ad. 554. [See also Riley v.

Power to lease, with direction to pay taxes.

And where the authority to lease is accompanied by a direction to discharge taxes or other outgoings out of the rents and profits, the ground for giving to the trustees the legal estate is still more conclusive.

Thus, in White *v.* Parker, (*z*) where a testator devised property to two trustees, in trust, as to three-fourth parts, to pay *or permit and suffer* his wife and two daughters respectively *to receive* each one-fourth of the *clear* yearly rents and profits to their respective sole and separate uses during their respective lives; and as to the other fourth, in trust to pay to *or permit and suffer* his son *to receive* the *clear* yearly rents and profits for life, with a contingent remainder; *and the trustees were empowered to demise the premises* [for any term not exceeding seven years] *reserving the best rent,* and were directed out of the rents and profits to pay and discharge all outgoings for taxes or otherwise in respect of *the premises, and to keep the premises in repair. It was held that the legal estate in the whole vested in the trustees, [but whether beyond the lives mentioned it was unnecessary to decide.]

But in Ackland *v.* Lutley, (*a*) where a testator devised lands to A and B upon trust that they and their heirs should set and let the premises, and out of the rents and profits in the first place pay a debt owing by the testator to M.; and in the next place pay certain legacies, which were to be paid as soon as the clear rents and profits would admit thereof; and from and after the debt and legacies were paid and discharged, the testator gave the same to C, his heirs and assigns forever. It was contended that, according to the recent authorities, the indefinite power of leasing constituted a ground for the trustees taking the fee; but the Court of Q. B. decided that the estate of the trustees terminated on the discharge of the debt and legacies, [and the Court of C. P. afterwards came to the same decision on the same will. (*b*) The latter court distinguished the preceding cases on the ground that no one could suppose at the death of the testator that the trustees could require more than a chattel interest, and that of a very limited extent, to make the specific ascertained payments which they were directed to make out of the rents of the estate.] (*c*)

In Doe *v.* Willan (as here) the disposition in favor of the beneficial

(*z*) 1 Scott 542, 1 Bing. N. C. 573.

(*a*) 9 Ad. & Ell. 879, 1 Per. & D. 636.

[(*b*) Ackland *v.* Pring, 2 M. & Gr. 937, 3 Scott N. R. 297.

(*c*) See also Doe d. White *v.* Simpson, 5 East 162; Heardson *v.* Williamson, 1 Kee. 33, both stated *post.*

devisees was in the language not of a trust but of an independent devise: but, [besides the distinction drawn in C. P. (the soundness of which has been questioned,)] (*d*) there were in Doe *v.* Willan other purposes, besides the power of leasing, requiring the trustees to take some estate (and it would seem an estate *pur autre vie*, the trust being for the separate use of a woman) which did not exist in the case just stated. The same remark applies to Doe *v.* Walbank. In this state of the authorities it seems too much to affirm that the giving to trustees an indefinite power to grant leases constitutes of itself an adequate ground for holding them to take the fee.

Remarks on Ackland *v.* Lutley.

[Still, the general rule now constantly acted upon is that where an estate is given to trustees all the trusts must *prima facie* be performed by them by virtue or out of the estate vested in them; and it seems to follow that if the devise is in fee, and there is a trust to grant leases of indefinite duration the trustees *will *prima facie* have the legal estate in fee, being the only estate which will enable them to perform the trust out of the estate vested in them. (*e*) The case is no doubt stronger where there are other trusts which clearly require the trustees to take some estate; for "it would be a strange and artificial construction to hold first that the natural meaning of the words should be cut down because they would give an estate more extensive than the trust required, and then when the trust does require the whole fee simple that it must be supplied by way of power defeating the estate of the subsequent devisees, and not out of the interest of the trustees." (*f*)

To rebut this *prima facie* construction it must be shown on the face of the will what less estate of definite duration will enable the trustees to serve the trusts out of their interest and not by way of power; and this not according to subsequent events, but according to events possible at the testator's death. (*g*) Thus in Doe d. Kimber *v.* Cafe (*h*) where a testator devised a house to trustees their heirs and assigns, in trust to pay the rents to his daughter E. for life for her separate use, and after her death to apply them for the maintenance of her children during their minority, and upon the youngest living attaining twenty-

Definite power to lease held exercisable only during other (clear) trusts.

Doe *v.* Cafe.

(*d*) By Jessel, M. R., L. R., 17 Eq. 257.

(*e*) See per Jessel, M. R., Collier *v.* Walters, L. R., 17 Eq. 265.

(*f*) Per Parke, B., Watson *v.* Pearson, 2 Ex. 581.

(*g*) Ib.; per Holroyd, J., 4 B. & Ald. 93.

(*h*) 7 Ex. 675.

one the testator devised the property to the children then living. Another estate was devised to the same trustees, in trust for the testator's grandson W. until he attained twenty-one, and then to W. in fee. And power was given to the trustees to lease both estates for twenty-one years. Pollock, C. B., delivered the judgment of the court, and observed that a power to lease afforded an argument of weight in favor of the legal estate (in fee) being intended to be given to the trustees, *especially* if it was an indefinite power as in Doe *v.* Walbank, but that it was not conclusive: and they held that the purposes of the trust did not require the estate of the trustees to continue after the youngest child had attained twenty-one, and that the power to lease was a *power* only to be exercised during the continuance of this estate so limited. "The authority to lease (said the C. B.) extends to all the houses devised to them, and in one of the devises an estate in fee is devised to the grandson on attaining twenty-one; and it cannot be supposed it was meant they should lease for twenty-one years in the event of that estate coming into possession."

*The argument in favor of giving the fee to the trustees afforded by the power to lease for a limited term was thus treated as not differing in kind from that afforded by an indefinite power; and it is not immediately obvious what estate of defined duration less than a fee the court would hold sufficient in order that a lease even for a limited term might take effect out of the interest of the trustees, and not by way of power.

As to a power to accept surrenders of leases.

A power for trustees to accept surrenders of leases, though capable of a different interpretation if the context requires it, means *prima facie* the acceptance of the particular estate by a person having *an estate* in reversion. (*i*) And a trust to apply rents and the value of mature timber in payment of debts implies such an estate in the trustees as will authorize them to cut the timber, that is the fee.] (*k*)

Effect of appointing persons "trustees of inheritance."

The case of Trent *v.* Hanning (*l*) is remarkable for the difference of opinion which prevailed in regard to the effect of some very ambiguous words. The will was in the following terms: "I do hereby give unto my wife £200 per annum during her natural life in addition to her jointure," (which

(*i*) Blagrave *v.* Blagrave, 4 Ex. 550.

(*k*) Collier *v.* Walters, L. R., 17 Eq. 265.]

(*l*) 1 B. & P. N. R. 116, 10 Ves. 495, 7 East 97.

was an annuity secured to her before marriage out of his real estate,) "my just debts being previously paid, and I do give unto my younger children £6000 each, to be paid when they severally come to the age of twenty-one; and I do appoint B, C and D as *trustees of inheritance* for the execution thereof." The Court of C. P., on a case from chancery, held that the trustees took no estate, and had no power to create any; but Lord Eldon being dissatisfied with this opinion, and considering that upon this point turned the question, whether the annuity debts and portions were a charge upon the real estate, sent a case to the K. B., three judges of which (Ellenborough, Grose and Le Blanc, *dissentiente* Lawrence) certified that the trustees took an estate in fee; they being of opinion that the words ["trustees of inheritance" were equivalent to the words] "trustees of my inheritance," [or] "trustees to inherit my estates for the execution of this my will." [Lord Eldon decided in conformity with this certificate, and his decision was finally affirmed in D. P. (*m*)

Appointment of persons to perform trusts of will;

Again, in Plenty *v.* West, (*n*) the words "I appoint W. exe*cutor of this my will so far as is necessary to the performance of the trusts relating to my real estate" occurring in a testamentary paper purporting to dispose only of real estate, and containing no direct devise, (*o*) but only a direction as to the division of such real estate, were held to give W. an estate in fee simple. And an appointment of A and B "to be trustees as also their heirs and *assigns* to both will and codicil," (both of which instruments dealt with real and personal estate,) was held by Sir R. Kindersley, V. C., to give the legal fee to the trustees. (*p*)

—"to be trustees as also their heirs and assigns."

But where there was a direct devise to two in trust, a subsequent appointment of these two and a third "to be trustees and executors" was held not to make the third a joint devisee. (*q*)

Direction to trustees to pay certain sums out of estate.

A direction that annual or gross sums shall be paid out of an estate by persons who are appointed executors of the estate, (*r*) or of the will, (*s*) or trustees "to see justice

[(*m*) 1 Dow 102.

(*n*) 6 C. B. 201.

(*o*) There was in fact a devise vesting the fee in trustees, but this was omitted in the case sent from chancery for the opinion of the Court of C. P. See 16 Beav. 175.

(*p*) Bennett *v.* Bennett, 2 Dr. & Sm. 272.

(*q*) Sidebotham *v.* Watson, 11 Hare 170.

(*r*) Doe d. Gillard *v.* Gillard, 5 B. & Ald. 785.

(*s*) Oates *v.* Cooke, 3 Burr. 1684, 1 W. Bl. 543.

done," (*t*) or the direction alone without such appointment, (*u*) is, it seems, an implied devise of the fee to those persons; and a direction to executors to manage leaseholds and pay the clear rents to A for life is a devise of the legal estate to the executors during the life of A. (*x*) So an appointment by codicil of a trustee in the place of a trustee named in the will, operates as an implied gift to the former of the trust estate.] (*y*)

Principle which regulates the *quantity* of estate.

The reader will have perceived (though the position has not hitherto been distinctly advanced), that the same principle which determines whether the trustees take any estate, regulates also the nature and duration of that estate; the established doctrine being (subject to certain positive rules of construction, propounded by the legislature, and which will be presently considered) that trustees take exactly that quantity of interest which the purposes of the trust require; and the question is not whether the testator has used words of limitation, or *expressions adequate to carry an estate of inheritance: but whether the exigencies of the trust [as they appear on the face of the will, without reference to events subsequent to the testator's death,] demand the fee simple, or can be satisfied by any and what less estate. (*z*) [8] [Those cases however in which it is laid down that the courts look *solely* to the trusts to be performed, even where there are words of inheritance, must be read with this qualification, that those words are to have their natural effect

(*t*) Anthony *v.* Rees, 2 Cr. & J. 75.

(*u*) Doe d. Beezley *v.* Woodhouse, 4 T. R. 89. See also Ex parte Wynch, 5 D., M. & G. 220; In re Boyce, 33 L. J., Ch. 390; and cf. London and South Western Rail. Co. *v.* Bridger, 10 Jur. (N. S.) 650.

(*x*) Stevenson *v.* Mayor of Liverpool, L. R., 10 Q. B. 81.

(*y*) In re Hough's Will, 4 De G. & S. 871; In re Turner, 2 D., F. & J. 527.]

(*z*) 8 Vin. Ab. 262, pl. 19, 3 B. P. C. Toml. 113, 1 Eq. Cas. Ab. 383, pl. 4; 3 Taunt. 326, and Fea. C. R. 54, Butl. n.; Lucas' Rep. 523, 10 Mod. 518; 2 Str. 798; Willes 650; Cas. temp. Talb. 145; 1 Ves. 485; 3 Burr. 1684; 2 T. R. 444; 7 Id. 433, 652; 3 East 533; 9 East 1; 1 Ves. & B. 485; 2 Sw. 375; 3 Bing. 13, 10 J. B. Moo. 453; 5 J. B. Moo. 143, 1 B. & Cr. 721, 3 D. & Ry. 58; 7 B. & Cr. 206; [4 Ad. & Ell. 589; 4 B. & Ald. 93.]

8. The trustees' estate is held in some states, at least, to cease when the purposes of the trust are accomplished, Peck *v.* Brown, 2 Rob. (N. Y.) 133; 1 N. Y. Rev. Stats. 730, § 67; Henderson *v.* Hunter, 59 Penna. St. 335. When the purposes of a trust are fulfilled, it will be discharged by the court, Inches *v.* Hill, 106 Mass. 578. The equitable title merges in the legal, when they are united in one person, Healey *v.* Alston, 25 Miss. 190; Matter of De Kay, 4 Paige 404. A trust estate is not governed by the statute of descents, but passes to the eldest son by the common law rule of descent, Wills *v.* Cooper, 1 Dutch. 137.

to give a fee simple unless the context shows that it is cut down to an estate terminating at some time ascertained at the time of the testator's death. If no precise period for the termination can be shown, it remains an estate in fee.] (*a*)

Estate of trustees commensurate with duties.

Thus, in the case of a devise to a trustee and his heirs, upon trust *to pay and apply the rents* for the benefit of a person for life, and after his decease to hold the lands *in trust* for other persons; the direction to apply the rents being limited to the *cestui que trust* for life, the estate of the trustee will terminate at his decease. (*b*) And it seems that a limitation to trustees and their heirs may be restrained by implication to an estate *pur autre vie* even in a deed, (*c*) [if necessary to prevent inconsistency or contradiction. (*d*)

To pay life annuity out of rents.

Again, in Adams *v.* Adams, (*e*) there was a devise to trustees and their heirs upon trust to permit and suffer J. to take the rents during his life, "subject with this proviso to pay my wife or her assigns an annuity of four guineas during her life; if J. die before my wife, to permit my wife to enjoy the lands during her life," and after the decease of J. and the testator's wife, the lands were devised to the heirs male of the body of J. The wife died in the lifetime of J. It was held, assuming that the annuity to the wife was not a legal rent charge (*f*) and that the *trustees took some estate in order to enable them to pay the annuity, that such estate lasted only during the life of the annuitant; J. therefore had, at all events, a previous estate of freehold which, joined to the

[(*a*) Per Parke, B., Blagrave *v.* Blagrave, 4 Ex. 550; per Coleridge, J., Poad *v.* Watson, 6 E. & B. 617; and per Jessel, M. R., Collier *v.* Walters, L. R., 17 Eq. 261.]

(*b*) Doe d. Hallen *v.* Ironmonger, 3 East 533; Robinson *v.* Gray, 9 East 1; [Cooke *v.* Blake, 1 Ex. 220; Playford *v.* Hoare, 3 Y. & J. 175.] Farmer *v.* Francis, 2 Bing. 151, 9 J. B. Moo. 310, seems *contra*, but the attention of the court was directed exclusively to another point.

(*c*) Venables *v.* Morris, 7 T. R. 342, 438; Blaker *v.* Anscombe, 1 B. & P. N. R. 25; Curtis *v.* Price, 12 Ves. 89.

[(*d*) Lewis *v.* Rees, 3 K. & J. 132; Cooper *v.* Kynock, L. R., 7 Ch. 398.

(*e*) 6 Q. B. 860, 9 Jur. 300.

What words create a legal rent-charge.—(*f*) Where lands are devised to trustees, "subject to" or "charged with" the payment of a yearly sum of money, a legal rent-charge is, it seems, created, Buttery *v.* Robinson, 3 Bing. 392; Ramsay *v.* Thorngate, 16 Sim. 575. But where real and personal property together are so given, it is a personal annuity, Taylor *v.* Martindale, 12 Sim. 158; Parsons *v.* Parsons, L. R., 8 Eq. 260; unlike rent reserved on a demise of realty and chattels, which issues out of the land alone, Farewell *v.* Dickinson, 6 B. & Cr. 251, 9 D. & Ry. 245.

subsequent limitation to the heirs male of his body, gave him an estate tail.

But if the annuity is charged on the *corpus* of the estate the trustees take the fee, because the trust may continue after the death of the annuitant, or arrears may be raised by sale or mortgage. (*g*)

As to commencement of estate of trustees.

And, as the estate of the trustees ceased when there was no longer any necessity for them to retain it, so it did not commence before there was a necessity that they should have it; as, under a devise to trustees upon trust to permit the testator's wife to receive the rents and profits till her son attained the age of twenty-one, and then upon trust to convey to the son in fee, it was held that although the trustees must take the legal estate in order to convey it to the son when of age, the wife took a chattel interest during the son's minority.] (*h*)

Indefinite devises to the *use* of trustees susceptible of enlargement or restriction.

And though (as we have seen) where the devise is to the *use* of the trustees, they take the legal estate independently of the evidence of intention supplied by the nature of the trust; and though by a necessary consequence of this principle the extent of their estate must, if the will is clear and express on the point, in like manner be regulated by the terms of the will; yet, if the testator has affixed no express limit to its duration, such estate will, as in other cases, be measured by the exigencies of the trust or duty (if any) which is imposed on the devisees. (*i*)

Rule as to appointments under powers.

And here it is proper to observe, that where a will takes effect as an appointment under a power to appoint the use, any devise which it contains will vest the legal estate in the devisee, irrespectively of any purpose or duty requiring that he should have the estate, as such devise amounts to a mere declaration of the use of the instrument creating the power, in other words, a mere nomination of the *cestui que use;* consequently any *limitation engrafted on the devise operates only on the equitable interest, though it be in terms *to the use* of the person or persons intended to take the estate beneficially.

(*g*) Fenwick *v.* Potts, 8 D., M. & G. 506. As to when a direction to raise money out of "rents and profits" charges the *corpus*, see ch. XLV. § 2.

(*h*) Doe d. Noble *v.* Bolton, 11 Ad. & Ell. 188.]

(*i*) See Curtis *v.* Price, 12 Ves. 89, where the limitations were in a deed, which makes the case stronger. [And see per K. Bruce, V. C., Riley *v.* Garnett, 3 De. G. & S. 632.]

And the result is the same in the case of devises of copyhold land, (*k*) as wills of such property take effect merely as instruments directory of the uses of the previous surrender to the use of the will, which was formerly essential to the validity of the devise, and the operation of which is now, by the statutes dispensing with the necessity of such surrender, (*l*) transferred to the will itself. It is clear, therefore, that a devise of copyhold lands simply to A and his heirs, in trust for B and his heirs, would vest the legal inheritance in A for the benefit of B, in fee. (*m*) Still, however, it should seem, according to the principle just stated in regard to devises of freehold lands *to the use* of trustees, that the extent and duration of an estate conferred by an *indefinite* devise of copyholds would, like that of a devisee *cestui que use* of freeholds (whose estate is undefined), depend upon, and be regulated by, the nature of the trust reposed in the devisee.

As to devises of copyholds.

But in Houston *v.* Hughes, it was argued at the bar, and assumed by the court, that as the copyholds included in the devise were not within the statute of uses, the trustees necessarily took the entire fee; however, this point does not appear to have been much canvassed, and the doctrine is not only irreconcilable with the principles of the analogous cases just stated, but is in direct opposition to Doe d. Woodcock *v.* Barthrop, (*n*) which was not cited, and is as follows: A devised copyhold lands to B and C, and their heirs, in trust to permit D or her assigns to occupy the same, or to pay to or permit her or her assigns to receive the rents, for her natural life for her separate use, and, subject to such estate and interest of D, the testator devised the premises to such uses as D should by her will appoint, and, in default of appointment, to her right heirs; it was held that under the limitation to B and C and their heirs, though not restricted in terms to the life of D, the estate was vested in B and C and their heirs for the life of D only, on whose decease the legal estate vested in the appointee of D (who exercised her power), and such appointee accordingly recovered in ejectment against the persons claiming under the surrenderee of the trustees.

Indefinite devise of copyholds limited by nature of trust.

*The same question may arise, and the same principle, it is con-

(*k*) See Houston *v.* Hughes, 6 B. & Cr. 403, 9 D. & Ry. 464.

(*l*) 55 Geo. III., c. 192, and 1 Vict., c. 26, § 4; *ante* vol. I., pp. *57, *60.

(*m*) Houston *v.* Hughes, 6 B. & Cr. 403.

(*n*) 5 Taunt. 382. [See also Baker *v.* White, L. R., 20 Eq. 177; Allen *v.* Bewsey, 7 Ch. D. 457.]

Bequests of leaseholds, how far influenced by nature of trusts.

ceived, would apply, with respect to leaseholds for years, which, it is well known, are not within the statute of uses. (o) Thus, a bequest of property of this description to A, simply in trust for B, would unquestionably vest the legal estate in A, although no duty or office were cast on him requiring that he should have the legal ownership; and, by necessary consequence, A must, in such a case, take the entire term, there being nothing to restrict or qualify his estate. It does not follow, however, that where a definite duty or office is imposed on the trustee, he would take the entire legal estate in the term; for, as the law allows chattel interests in lands to be made the subject of an executory bequest after a prior limitation, not exhausting the whole term, even though the prior interest were an estate for life, it seems to be a necessary result of this doctrine, that such an executory bequest may be made ulterior to the partial or limited estate of a trustee; and it cannot be material whether the restriction of the trustee's estate was in express terms, or resulted from the nature of the duty imposed on him. For instance, if a term of years were bequeathed to A, until B should attain the age of twenty-one years, in trust for the maintenance of B, and when he attained the age of twenty-one, then to B, there can be no doubt that the estate of the trustee would terminate at the majority of B, from which time the property would vest in possession in B. And it is conceived that the effect would be the same if the bequest were in the following terms: "I give my leasehold estate called A, to B, his executors or administrators (without any specification of estate), upon trust to pay the rents to C during his minority, and when he shall attain twenty-one, then I give the same to C." The estate of B would cease at the majority of C, when the purposes of the trust would be at an end, although the bequest of B leaves undefined the nature and extent of his estate. (p)

And here it may be observed that where a testator has an equitable interest only in the land which is the subject of a devise in trust, and

Inconvenience of leaseholds for years not being within statute of uses.—(o) Not a little practical inconvenience has arisen from the exclusion of chattel interests in land from the operation of the statute of uses, whatever may have been the real ground of that exclusion; which is a point on which an entire coincidence of opinion appears not to exist. [The stat. 22 and 23 Vict., c. 35, § 21, which enables any person to assign chattels real directly to himself and another, has removed one fruitful source of this inconvenience.

(p) See acc. Stevenson v. Mayor of Liverpool, L. R., 10 Q. B. 81.]

Effect where testator, who apparently creates a trust, has an equitable interest only.

such devise would, if the testator had the legal ownership, carry the dry legal estate only, unaccompanied *by any duty or office, the trustee takes nothing under the devise; the effect being the same as if the land had been devised directly to the *cestui que trust*. If, however, the trusteeship created by the will is of a nature to involve the performance of any office or duty (as a trust to sell or grant leases), the devise, though failing so far as it purports to vest the legal estate in the trustee, has the effect of onerating him with the prescribed duty in respect of the devised equitable interest, no less than if the legal estate had passed under it. For instance, supposing the testator to devise lands in which he has only an equity of redemption to A in fee-simple, in trust for B, the devise would not confer any estate, or impose any duty on A, but the entire beneficial interest would pass directly to B. If, on the other hand, the testator had devised such equity of redemption to trustees, upon trust for sale, though the trustees would not have acquired any actual estate at law (the testator himself having none), yet the property would be salable by the trustees in the same manner as if the legal ownership had become vested in them.

Devises to pay debts, legacies, &c.

It is sometimes a question of difficulty (but which, as we shall presently see, cannot arise under wills that are regulated by the present law), to determine whether a devise to persons, without words of limitation, to pay debts and legacies, raise a sum of money, secure a jointure, or the like, gives them the inheritance or a chattel interest only.[9] In Cordal's Case, (*q*) where the devise was to two persons, to hold for payment of legacies and debts, and afterwards to A for life, with remainders over; it was resolved that this was no freehold in them, but only a term of years, "though it could not be said for any certain number of years."

So, in Carter *v.* Barnadiston, (*r*) where a testator devised that, in

9. Barnett's Appeal, 46 Penna. St. 392; Shankland's Appeal, 47 Id. 113; Fay *v.* Taft, 12 Cush. 448; Wright *v.* Douglass, 7 N. Y. 564; Striker *v.* Mott, 28 N. Y. 89; Cutter *v.* Hardy, 48 Cal. 568; Pearce *v.* Savage, 45 Me. 90; Mead *v.* Jennings, 46 Mo. 91; Ioor *v.* Hodges, 1 Speers Eq. 593, 597; Tobias *v.* Ketchum, 32 N. Y. 328; La Grange *v.* L'Amoureux, 1 Barb. Ch. 18; People *v.* Robinson, 29 Barb. 79; Killam *v.* Allen, 52 Barb. 606; Walker *v.* Whiting, 23 Pick. 313; Ware *v.* Richardson, 3 Md. 505, 548; Inman *v.* Jackson, 4 Greenl. 237; Richardson *v.* Woodbury, 43 Me. 206.

(*q*) Cro. El. 316.

(*r*) 1 P. W. 505, 2 Eq. Cas. Ab. 224, pl. 5, 6, 3 B. P. C. Toml. 64.

Indefinite chattel interest held to be created.

case certain property should not be sufficient to pay his debts and legacies, then his executors should receive the profits (s) of his real estate for payment of his debts and legacies, and, after those should be paid, then he devised certain lands to P. for life, with remainders over; it was considered that the executors took a chattel interest only until the debts and legacies were paid. (t)

*But in Gibson v. Lord Montfort, (u) where A gave all his real and personal estate to trustees, their executors, administrators and assigns, in trust to pay several annuities, sums and legacies out of the produce of the personal estate; if that should be deficient, then to pay the same out of the rents and profits arising by the real estate; and as to the residue of his real and personal estate, after provision being made for payment of the legacies, &c., he gave the same to the children of his daughter; Lord Hardwicke held that the trustees took a fee; for that, if these pecuniary legacies were not paid, the real estate must be sold to satisfy them; that this was a purpose which it was impossible to serve, unless the trustees had the inheritance. He said that the objection, that the words of limitation were descriptive of a chattel interest, might have had weight if there had not been a personal estate included in the devise.

It will be observed, that here the word "estate" was adequate to pass the fee independently of the trust; but this was not adverted to by Lord Hardwicke.

Trust to raise sum of money.

In the next case, however, a limitation to trustees and their personal representatives, to raise a sum of money, was held, under the circumstances, to confer a chattel interest only, in addition to an estate of freehold which they took for other purposes.

Trustees held to take a chattel interest.

The case referred to is Doe d. White v. Simpson, (x) where a testator devised to A and B, and the survivor of them, and the executors and administrators of such survivor, certain lands, and the arrears of rents, and a bond and judgment given by C, a tenant, for rent due, in trust that they out of the rents and profits and arrears due should pay two life annuities; and, after payment thereof, then, in trust out of the residue of the rents and profits to pay to certain persons £800 for the children of W., and

(s) As to the question whether the moneys in these cases are raisable out of the annual profits, or authorize a sale, see *infra*, ch. XLV., § 2.

(t) See also Hitchens v. Hitchens, 2 Vern. 403, Pre. Ch. 133.

(u) 1 Ves. 485

(x) 5 East 162.

after payment of the said annuities and the £800, he devised the said estates to W. for life, with remainders over. And the testator authorized A and B, and the survivor, his executors, &c., to grant building leases, as often as there should be occasion, for any number of years. It was held, that the trustees took the legal estate for the lives of the annuitants, together with a term of years sufficient for the purpose of raising the £800, and not the fee. Lord Ellenborough relied *much on the bond and judgment being coupled with the lands in the devise.

So, in Heardson *v.* Williamson, (*y*) where a testator devised to A and B, and the survivor of them, and the executors or administrators of such survivor, an estate at P., and a tenement at S., and the fixtures of his shop, in trust for sale, and with the money arising from such sale to pay off all such sums as should be owing upon mortgage of all or any of the estates thereinafter devised, and if any surplus should remain, upon trust to pay such surplus to his wife; and the testator devised his other estates to his wife during widowhood, subject to an annuity, and to the annual payment of £100 until the mortgage debts thereinbefore directed to be paid by the sale aforesaid were discharged; and, after the decease of his said wife, in case the said debts should not have been paid off, the testator gave such estates *to A and B and the survivor of them, and the executors or administrators of such survivor, in trust to let the same, and apply the rents in payment of the mortgage debts if any should remain, until the whole should be paid by the gradual receipt of the rents;* and, after the decease or marriage of his wife, or the liquidation of the mortgage debts (as the case might be), the testator devised the last-mentioned estates to his son for life, with remainder to such children as he should have in fee. The son [who was heir-at-law] (*z*) executed a conveyance, which, if the estate limited to his children was a contingent remainder (he then having had no child), had destroyed such remainder; and hence arose the question, whether the trustees took the fee; if they did, the interests of the children, being equitable, of course were indestructible. Lord Langdale, M. R., admitted that the circumstances of the estate being limited to the trustees and their executors or administrators, would not prevent the fee from vesting in them if the purposes of the trust required it; but he observed that they were to take only an estate until the debts were paid, and he did not see the least necessity for their having the reversion for that limited purpose.

(*y*) 1 Kee. 33.

[(*z*) 5 L. J. (N. S.), Ch. 166.

The construction which gives to trustees an undefined chattel interest, either with or without a prior freehold, has been considered so inconvenient in its consequences, and so difficult of application, that its exclusion was (as we shall presently see) made one of the objects of the stat. 1 Vict., c. 26.

Doctrine of cases just stated abolished by 1 Vict., c. 26.

*[Even under the old law there was no case where, if the devise was in the first instance to trustees and their heirs, they were held to take an indefinite chattel interest. (a) Under such a devise, they were in some cases held to take a base fee determinable on payment of the charges, whether those charges were to be raised out of annual rents (b) or by sale or mortgage of the estate. (c) That construction, however, was inconsistent with the rule afterwards more fully recognized, that the express fee remained unless cut down by the context to a less estate of definite duration, and the cases in which it had been adopted were ignored: (d) their very existence was lately denied. (e)

Trustees held to take a determinable fee.

In Collier v. Walters (f) a testator devised land to A and B, their heirs and assigns, upon trust to stand seized of the same "during the life of W. C., and also until the whole of my just debts, together with the following legacies, be fully paid off" upon the trusts thereinafter named, viz., upon trust to set and let the same, and to pay and apply the rents and yearly profits and the value of mature timber in discharge of the debts until they were paid, and then of the legacies, and from thenceforth upon further trust to pay over the rents to W. C. during his life, and after his decease and payment of all the debts and of the legacies and trust expenses, the testator "devised his said real estate to the heirs of the body of W. C., and for default of such issue to the testator's right heirs forever." In a previous case on the same will, it had been held by Sir J. Romilly, M. R., that the trustees took a determinable fee; (g)

Indefinite chattel interest not created where devise expressly in fee.

(a) The case of a defined chattel interest either expressly limited, Warter v. Hutchinson, 2 B. & Bing. 349, 1 B. & Cr. 721, or implied from the trusts, Doe. d. Kimber v. Cafe, 7 Ex. 675, must of course be distinguished.

(b) Wellington v. Wellington, 4 Burr. 2165, 1 W. Bl. 645. See also Doe d. Brune v. Martyn, 8 B. & Cr. 497.

(c) Glover v. Monckton, 3 Bing. 13.

(d) Blagrave v. Blagrave, 4 Ex. 550. And see Poad v. Watson, 6 Ell. & Bl. 606.

(e) By Jessel, M. R., L. R., 17 Eq. 261.

(f) L. R., 17 Eq. 252.

(g) Collier v. M'Bean, 34 Beav. 426. On appeal, L. R., 1 Ch. 81, K. Bruce, L. J., thought the trustees had a fee simple absolute; but under the circumstances the court would not force on a purchaser a title depending on that construction.

but this was deemed by Sir G. Jessel, M. R., to be untenable. (*h*) It was then argued that the express terms of limitation ("during the life of W. C., and also until" debts and legacies were paid) gave the trustees a freehold interest during the life of W. C., and, if at his death the debts were not paid, a further chattel interest until they were paid. But the M. R. rejected this construction also. He said it was *quite a possible interest, but he could not find it there. It might have been so if those were the words, but they were not the words. It would give a new estate (if necessary) *after* the life estate; but the words were, in the first place, "to pay the rents and profits," and then to pay the surplus to the tenant for life, showing that, instead of raising a new contingent estate the testator thought that W. C. would live long enough to allow the rents to pay off the whole of the debts and legacies during his life. (*i*) There was not enough, therefore, to cut down the fee first given to any less estate; while the trust to set and let, and the implied authority to cut timber, which in the absence of an express power they could only possess as owners of the fee, were reasons the other way.

It is further to be observed that,] even under the old law, it was held that if the purposes of the trust could not be satisfied by an estate *pur autre vie*, or by such an estate with a chattel interest superadded, the trustees took the fee, though the prescribed purposes did not require and could not exhaust the entire fee simple.[10]

Trustees held to take a fee, though the trust was not strictly commensurate.

Thus, in Harton *v.* Harton, (*k*) where the devise was to A and B and their heirs, in trust to permit C (a *feme coverte*) to receive the rents during her life for her separate use and so as not to be subject to the debts, &c., of her husband, with remainder to the use of her sons successively in tail, remainder to her daughters in tail; and in default of such issue (without fresh words of gift,

Harton v. Harton.

See now as to doubtful titles Alexander v. Mills, L. R., 6 Ch. 124.

(*h*) He said that no authority could be found for such an estate. Neither Wellington *v.* Wellington nor Glover *v.* Monckton was cited.

(*i*) This, pushed home, would show an intention to give the trustees and their heirs an estate for the life of W. C. and no more. Might not "the words" mean only that the debts and legacies should have priority in right during the life of W. C., and if at his death there were any still unpaid then that the trustees should have some further estate "until" payment?]

10. Deering *v.* Adams, 37 Me. 264; Inman *v.* Jackson, 4 Greenl. 237; Richardson *v.* Woodbury, 43 Me. 206.

(*k*) 7 T. R. 652. See also Hawkins *v.* Luscombe, 2 Sw. 391.

upon trust to permit D (another *feme coverte*) to receive the rents for her separate use, with remainder to the use of her sons and daughters in tail in like manner, and so on to another *feme coverte* and her children, and then to the use of E in tail, with reversion to the use of the testator's own right heirs. It was held that the trustees took the fee; "that construction," it was said, "being necessary to give legal effect to the testator's intention to secure the beneficial interest to the separate use of the *femes coverte*."

Lord Eldon's comment on Harton v. Harton.

Of this case, Lord Eldon has observed, that "there being trusts for the separate use of married women, after various trusts not for married women, those trusts could not subsist *unless the legal estate was in the trustees from the beginning to the end; and they relied on the non-repetition of a legal estate, there being a gift to the wife of one of the parties; and if there had been a repetition of the legal estate after every trust for a married woman, they would not have held the whole legal estate to be in the trustees." (*l*)

Remark thereon.

Perhaps it is not strictly accurate to say, that in this case a fee in the trustees was *necessary* to secure the beneficial interest to the *femes coverte;* for though the trusts in favor of the second and third women could not arise until the failure of the objects of the intervening limitations in tail, yet still they must inevitably take effect, if at all, in their lifetime, and the fact that in reaching them the estate necessarily comprehended the objects of the intervening limitations, with regard to whom no purpose was to be answered requiring that the trustees should take an estate, might seem to be no reason for extending that estate to the limitations *subsequent* to the gifts to the several *femes coverte.* But probably the court thought it better to vest the whole fee in the trustees, than to create a particular estate which might extend to *some* of the beneficial devisees not within the scope of it, and would affect their relative situation, by preventing the devisees in tail, to whom it extended, from suffering a recovery.

[In Brown *v.* Whiteway, (*m*) which was a devise to trustees and their heirs on trusts somewhat similar to those in Harton *v.* Harton, Sir J. Wigram, V. C., felt bound by its authority, and decided accordingly; but said he could not see why it was necessary to hold that the intermediate estates should not be good legal estates. However,

(*l*) See Hawkins *v.* Luscombe, 2 Sw. 391. [(*m*) 8 Hare 145.

the authority of Harton *v.* Harton has been frequently recognized and followed, and must be considered established.] (*n*)

The case of Wykham *v.* Wykham (*o*) presents a remarkable instance of contrariety of judicial opinion as to the estate authorized to be created by a power to jointure. A devised lands to his eldest son for life, remainder to that son's first and other sons in tail male, with remainder to the testator's other sons and their sons in like manner. The will contained a power to the devisor's sons, as they should become entitled in pos*session, "from time to time to grant, convey, limit and appoint all or any parts, &c., *to trustees*, upon trust by the rents and profits thereof to raise and pay any yearly rent-charge, not exceeding £1000, as a jointure for any wife or wives that he or they should thereafter marry, for and during the term of such wife's natural life only." The devisor's eldest son B in exercise of his power conveyed and appointed the lands so devised to him to trustees and their heirs, upon trust to raise and pay certain yearly rent-charges (amounting to £1000), to his intended wife as a jointure. After the death of B, but during the life of the jointress his widow, the next tenant in tail, who was let into possession, suffered a recovery, the validity of which depended upon this, whether the appointment did or did not vest in trustees an estate of freehold for the life of the jointress. If it did, the recovery was void for want of the immediate freehold, which was, in that case, outstanding; but in every other event, *i. e.*, if the appointment passed no estate, or a chattel interest only, or the fee, it was good, in the former case as a legal, and in the latter as an equitable recovery. Lord Eldon sent a case to the Court of K. B., who certified that the trustees took a fee. The same question was then sent to the C. P., and that court was of opinion that the trustees took *no* estate. On the conflicting certificates Lord Eldon held that the recovery was good, and that the estate which the trustees should have taken was a term of years, with a proviso for *cesser* of it on payment of the rent-charge during the life of the jointress and all arrears thereon at the time of her death, *as that would not have gone to disturb any of the subsequent uses.* (*p*)

Power to limit an estate as a jointure.

Remarkable diversity of judicial opinion.

It is observable that, greatly as the several opinions varied in the

(*n*) See Toller *v.* Attwood, 15 Q. B. 929.] As to a direction to settle, see Knocker *v.* Bunbury, 8 Scott 414, 6 Bing. N. C. 306.

(*o*) 11 East 458, 3 Taunt. 316, 18 Ves. 395; [Blagrave *v.* Blagrave, 4 Ex. 550.]

(*p*) See Sugd. Pow. 399, 924 (8th ed.)

construction of the devise, they all conducted to the same conclusion as to the recovery, which, *quacunque via*, was good.

As to devises to trustees for preserving contingent remainders.

With regard to estates limited to trustees for preserving contingent remainders, it may be observed that although they may not be (as such estates usually are) in terms confined to the life of the person taking the immediately preceding estate of freehold, yet they will be so restricted in construction, if the will disclose no other purpose which requires that the trustees should take a larger estate.[11]

Thus, in Doe d. Compere *v.* Hicks, (*q*) where a testator devised *lands, after the decease of his wife, to his father A for life, with remainder to B for life, and after the determination of that estate, *unto trustees and their heirs, in trust to preserve contingent remainders from being defeated, and to make entries, and nevertheless to permit B to receive* the rents and profits during his life, and after his decease, unto the first and other sons of the body of B in tail male successively, and in default of such issue, unto his (testator's) brother C for life, and after that estate determined, *unto the trustees and their heirs to preserve the contingent remainders in manner aforesaid* (with various remainders limited in a similar manner.) On an ejectment brought by one of the beneficial devisees it was contended that the fee was in the trustees under the unrestricted limitation to them and their heirs. But the court was of opinion that, taking the whole instrument together, it appeared that the testator intended the trustees to take only an estate for the lives of the several tenants for life, in order to protect the contingent remainders. If the trustees had taken the whole interest in the estate, it was not necessary for the testator again to give them the same estate after all the subsequent estates for life.

This decision has been noticed with approbation by Sir W. Grant, (*r*)

11. In Webster *v.* Cooper, 14 How. (U. S.) 488, 499, it was said by Curtis, J.: "The duties to be performed by them, (the sole trustees), in reference to these lands, are to take the life estates, in case of forfeiture, and hold them so that the future remainder-men may not be deprived of the legal estates limited to them by way of contingent remainders. * * * It was not intended the trustees should hold the fee, because there are express limitations of life estates to them to preserve contingent remainders, which would be wholly inoperative if they took the fee."

(*q*) 7 T. R. 433, [and see Haddelsey *v.* Adams, 22 Beav. 266.]

(*r*) See 12 Ves. 100.

and seems to be abundantly sustained by the principles of analogous cases. Lord Kenyon, in the course of his judgment, however, in allusion to Venables *v.* Morris, (*s*) (which had been urged as an authority for holding the trustees to take the fee,) suggested that the result would be different where, under the limitations in question, any person had a power of appointment, which, his lordship considered, would render it necessary that the fee should be in the trustees, *with a view to the possibility of the donee creating under the power contingent remainders which might require protection.* In Venables *v.* Morris the limitations (in a deed) were to the use of A for life, with remainder to the use of trustees and their heirs for the life of A, to preserve contingent remainders, remainder to the use of B (wife of A) for life, remainder to the use of the same trustees *and their heirs, in trust to support the contingent uses, and permit B and her assigns to receive the rents;* and after the decease of A and B, to the use of the first and other sons of the marriage successively in tail, with remainder to the use of the first and other daughters successively in tail, remainder to the use of such persons as B should by deed or will appoint, and, in default of *appointment, to the use of the right heirs of B. B, by a deed-poll, appointed the estate to the right heirs of A. The contest was between the heirs of A and the heirs of B, the former claiming under the limitation in the appointment, and the latter under the settlement. One of the points contended for by the heir of B was that, the remainder in fee being in the trustees, an equitable interest only passed to the heirs of A under the appointment, and which could not unite with the estate for life of A under the settlement; but the court was of opinion that the heir of A was entitled *quacunque via;* for if the limitation to the heir of A under the appointment was a legal limitation, it united with A's estate for life under the settlement, and conferred the fee; but if it did not, then it was a contingent remainder in equity to the heir, and he took by purchase. Lord Kenyon subsequently expressed a more decided opinion that the legal estate in fee was in the trustees, and the certificate of the court (it being a case from chancery) was in conformity to this opinion.

Remarks on Doe d. Compere *v.* Hicks.

Reservation of power of appointment held a ground for giving trustees the fee.

The ground on which Lord Kenyon rested the certificate of the court, involves a very extensive and no less novel doctrine, and one which, in the absence of any

Remarks on doctrine of Venables *v.* Morris.

(*s*) 7 T. R. 342, 437.

confirmatory decision, cannot be relied on. To hold that the mere circumstance of there being included in the limitations a power of appointment, by virtue of which contingent remainders *might* be thereafter created, constitutes of itself a ground for vesting the fee simple in the trustees, is evidently going much further than making trustees take the fee because contingent remainders are actually created by the instrument containing the limitation to them; though even the latter more moderate doctrine has not been invariably countenanced by the authorities.

Whether the creation of contingent remainders is a ground for giving trustees the fee.

Thus, in Heardson *v.* Williamson (*t*) Lord Langdale, M. R., does not appear to have regarded the fact that the will contained a contingent remainder of the devised estate as a sufficient ground for holding the fee to be in the trustees.

On the other hand, in Cursham *v.* Newland (*u*) trustees were held to take the fee under a will which appeared to supply no other ground for such a construction; and in Doe *v.* Willan (*v*) and Houston *v.* Hughes (*x*) Bayley, J., considered that the circumstance of contingent remainders being created by the will *favored the conclusion that the trustees took the legal inheritance. In Barker *v.* Greenwood, (*y*) too, it seems to have been regarded by Parke, B., in the same point of view, though this able judge disclaimed any reliance on the point; because the question in that case was not whether the trustees took the fee, but whether they took an estate *pur autre vie*, and he considered it to be doubtful whether the trustees of such an estate would be bound, in the absence of an express trust, to preserve contingent remainders, a point which [has since been decided in the negative,] (*z*) their estate being created *diverso intuitu*.

At all events, [the mere existence of contingent remainders will not give the legal fee to the trustees where the will contains express limitations to them of particular estates (including estates *pur autre vie* in trust to preserve) which would be nugatory if they already had the fee. (*a*) It is also] clear that an express direction to trustees to preserve contingent remainders will not have any influence on the construction, if the will contains no such remainder; (*b*) nor where the

(*t*) 1 Kee. 33, *ante* p. *312.

(*u*) 2 Scott, 113, 2 Bing. N. C. 64. But see Cunliffe *v.* Brancker, *post* p. *319.

(*v*) 2 B. & Ald. 84, *ante* p. *299.

(*x*) 6 B. & Cr. 420.

(*y*) 4 M. & Wels. 431.

[(*z*) Collier *v.* Walters, L. R., 17 Eq. 265, 266.

(*a*) Cunliffe *v.* Brancker, 3 Ch. D. 401.]

(*b*) Nash *v.* Coates, 3 B. & Ad. 839.

subject of devise is a copyhold estate, as contingent remainders created of such property are not destructible, and therefore do not require any limitation of this nature for their preservation; (c) [nor, it is presumed, where the contingent remainder is protected by stat. 40 and 41 Vict., c. 33.] (d)

Where devise includes other property as to which trustees take the legal estate.

It seems that where a will is so expressed as to leave it doubtful whether the testator intended the trustees to take the fee or not the circumstance that there is included in the same devise other property which necessarily vests in the trustees for the whole of the testator's interest, affords a ground for giving to the will the same construction as to the estate in question. (e)

Where trust fails *ab initio*.

[If all the active trusts, together with all the ulterior limitations fail *ab initio*, as, by lapse, the devise to the trustees, if sufficient to carry the fee, will operate to the full extent, and they will hold in trust for the heir, if there be one; or if not, for their own benefit.] (f)

General remark upon the cases.

Here closes the long catalogue of decisions respecting the *quality and extent of the estate conferred by devises in trust, from which the reader will have collected the principles that govern cases of this description, and the considerations which have been admitted to influence the construction, though, as the question is constantly presenting itself under new aspects and combinations of circumstances, difficulty will sometimes occur in the application of the established doctrine.

Stat. 1 Vict., c. 26, §§ 30, 31.

Of all the adjudged points connected with the subject, that which has been deemed the least satisfactory is the doctrine of those decisions (g) which, in certain cases, gave to trustees whose estate was undefined a term of years (either with or without a prior estate for life), determinable when the purposes of the trust should be satisfied. To exclude the application of this inconvenient and very refined rule of construction, two enactments have been introduced into the statute 1 Vict., c. 26. Section 30 provides, "That when any real estate (other than or not being a presenta-

(c) See Doe d. Woodcock v. Barthrop, 5 Taunt. 382.

[(d) Vol. I., p. *874.]

(e) Houston v. Hughes, 6 B. & Cr. 403; [Baker v. Parsons, 42 L. J., Ch. 228. But the argument was ridiculed by Jessel, M. R., Baker v. White, L. R., 20 Eq. 173.

(f) Cox v. Parker, 22 Beav. 168, 25 L. J., Ch. 873.]

(g) *Ante* p. *310.

tion to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will, in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication."

Estate of trustees, if not expressly limited, to be either freehold or an estate in fee.

Section 31 provides, "That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

Remarks on stat. 1 Vict., c. 26, §§ 30, 31.

These clauses have been the subject of much criticism. (*h*) It is not easy to perceive why the provision regulating the estates of trustees should have been split into two sections, and still more difficult is it to give to each of those sections such a construction as will preserve it from collision with the other. The design of section 30 would seem to be simply to negative the construction which, in certain cases, (*i*) gave to a trustee an undefined *term of years, for it allows him to take an estate of freehold, or a *definite* term of years, either expressly or by implication; but section 31 takes a wider range, as it admits of neither of these exceptions, nor that of a devise of the next presentation to a church. Its effect is to propound, in regard to wills made or republished since the year 1837, the following general rule of construction: that whenever real estate is devised to trustees (and it would seem to be immaterial whether the devise is to the trustees indefinitely, or to them and their heirs, or to them and their executors or administrators), for purposes requiring that they should have *some* estate, without any specification of the nature or duration of such estate, and the beneficial interest in the property is not devised to a person for life, or being so devised, the purposes of the trust may endure beyond the life of such person, the

(*h*) See H. Sugd. Wills 127; Sweet on Wills Act 154; Sugd. R. P. Stat. 380.

(*i*) *Ante* p. *310.

trustees take (not, as in Carter *v.* Barnardiston, an estate for years, or, as in Doe *v.* Simpson, an estate for life, with a superadded term for years, but) an estate in fee simple. The result, in short, is that trustees, whose estate is not expressly defined by the will, must, in every case, *and whatever be the nature of the duty imposed on them*, take either an estate for life or an estate in fee.

It is observable that this section allows the trustees to take an estate of freehold, not whenever the purposes of the trust require such an estate, but only in the specified case of the "surplus rents and profits being given to a person for life," making no provision, therefore, for the case (a possible though not frequently occurring one) of a trust of any other kind being created for a purpose co-extensive with life; for instance, a trust to keep on foot a policy of life insurance. Possibly it would be held that such a case is excluded from section 31 by the exception in section 30, and thus some effect would be given to this otherwise apparently idle clause of the statute; farther than this (even if so far), it is presumed the exceptive part of section 30 could not be construed to qualify or control the operation of section 31, but decision alone can settle the point.

Points not excluded by the act.

The enactments in question do not, beyond the particular cases which have been pointed out, interfere with the general doctrines of construction discussed in the present chapter. Even under wills made or republished since the year 1837, it may still be questionable whether trustees take *any* estate or only a power; (*k*) also whether they take an estate limited to the lives *of the tenants for life of the beneficial interest, or an estate in fee simple; and consequently there should be no relaxation in the anxious care of framers of wills to preclude ambiguity in this particular. It cannot, however, according to the suggested construction of section 31, under *such* wills become a question, whether trustees take an estate in fee, or a chattel interest, in order to raise money, or for any other purpose.

The new doctrine would not, it is conceived, preclude the construction that trustees take an estate *pur autre vie*, with a power of sale over the inheritance. The writer is not aware, however, of any adjudged instance of such a construction, for where an estate is devised to trustees indefinitely, the authorities conduct to the conclusion, that whatever duty is subsequently imposed on them must be in virtue of their

(*k*) See *e. g.* Spence *v.* Spence, 12 C. B. (N. S.) 199, cited *ante* p. *297.

estate, the quality and duration of which are to be measured accordingly. The point, of course, depends on the conclusion to be fairly drawn from the entire will.

[Similar questions may arise regarding other powers, as, to lease, or to apply rents for maintenance of minors. Thus in In re Eddels' Trusts, (*l*) where a testator devised real estate to trustees, to hold unto them and the survivor of them his heirs and assigns, upon trust for his wife for her separate use for life, and after her death for his niece for her separate use for life; and after the death of the niece upon trust for such of her children as should attain twenty-one; and he declared that it should be lawful for his trustees, with the consent of his wife during her life, to lease the property for any term not exceeding twenty-one years at the best rent; it was held by Sir J. Bacon, V. C., that the trustees took the legal estate in fee, apparently on the ground that any lease granted by them must be in virtue of their estate, and that this purpose *might* require an estate in them beyond the lives of the tenants for life.

Trust for separate use of *feme coverte* with power to lease for twenty-one years;

So in Berry *v.* Berry, (*m*) where a testator devised real estate to trustees "their heirs and assigns to the use of" A for life; remainder "to the use of" such children of A as should attain twenty-one in fee, with an alternative remainder in fee; and he directed that A should keep buildings insured and repaired, and in default that the trustees should receive the rents and thereout pay the cost of repairing and insuring, and pay the residue to A: he also empowered the trustees to apply all or any part of *the income for the maintenance of any infant devisee during his minority. By a codicil the testator devised "unto and to the use of" his trustees certain lands he had agreed to sell, in trust to complete the sale. Sir C. Hall, V. C., held that whether the trustees had the legal estate during the life of A or not (*n*) the provision for maintenance constituted a trust of the rents which the terms of that provision showed were to be received by them, not by virtue of a power of entry, but by force of an estate vested in them under the devise, and that the estate which they so took was the fee, whether considered under the old law or under section 31 of the statute. He thought that the devise in the codicil, notwithstanding its different form and that, according to his construction of the will, the codicil was unnecessary, was not enough to show that all the limitations in the will were to be legal uses.

—to apply rents during minority.

(*l*) L. R., 11 Eq. 559.

(*m*) 7 Ch. D. 657.

(*n*) As to the estate of trustees not commencing until wanted, *vide sup.*, p. *307.]

*CHAPTER XXXV.

WHAT WORDS CREATE AN ESTATE TAIL.

A limitation to a person and the heirs of his body creates an estate tail general.[1] If it be to him and the heirs *male* or the heirs *female* of his body, he takes an estate tail special, descendible in the male or female line, as the case may be.

Proper terms of limiting an estate tail.

1. In many states estates tail have been converted into estates in fee simple by statute: **Alabama** (Code 1876, § 2179); **Connecticut** (1784, Rev. Stats. 1875, p. 352, § 3); **Delaware** (Rev. Code 1872, p. 507, § 27); **Maine** (Rev. Stats. 1871, p. 559, § 4); **Maryland** (Rev. Stats. 1860, p. 136, § 24); **Massachusetts** (Gen. Stats., p. 466, § 4); **Minnesota** (Stats. at Large 1873, p. 613, § 3); **North Carolina** (Bat. Rev., p. 383, § 1); **Pennsylvania** (1855, Purdon's Dig., p. 620, § 8); **Rhode Island** (Gen. Stats. 1872, p. 348); **Tennessee** (Code 1858, § 2007); **Virginia** (Code 1873, p. 889); **West Virginia** (Code 1868, p. 461); or abolished: **California** (Code 1876, § 5763); **Georgia** (Code 1873, § 2250); **Illinois** (Code 1877, p. 272, § 13); **Indiana** (Code 1876, p. 368, § 36); **Kentucky** (Rev. Stats. 1877, p. 585, § 8); **Michigan** (Comp. L. 1871, p. 1325, § 3); **Mississippi** (Laws 1857, p. 307); **New York** (2 Rev. Stats. 1876, p. 1100); **Ohio** (1811, Rev. Stats. 1869, p. 550); or converted into life estates with a remainder in fee simple: **Colorado** (Gen. L. 1877, § 166); **New Jersey** (1 Rev. Stats. 1877, p. 299, § 11); **Vermont** (Laws 1874, p. 446.) See also **Mason** *v.* **Johnson**, 47 Md. 347; **Tinsley** *v.* **Jones**, 13 Gratt. 289; **Bramble** *v.* **Billups**, 4 Leigh 90; **Thomason** *v.* **Andersons**, Id. 118; **Nowlin** *v.* **Winfree**, 8 Gratt. 346; **Callis** *v.* **Kemp**, 11 Id. 78; **Ball** *v.* **Payne**, 6 Rand. (Va.) 73. Apart from the above statutes see notes to next chapter for sufficiency of limitations to issue, descendants, children, &c., to create an estate tail. A limitation over to "heirs of the body" gives an estate tail unless a contrary intention appear, **Fellows** *v.* **Tann**, 9 Ala. 1003; **Wells** *v.* **Beall**, 2 Gill & J. 458; **Brown** *v.* **Anderson**, 2 Harr. & McH. 100; **Williams** *v.* **Hichborn**, 4 Mass. 189; **Lithgow** *v.* **Kavanagh**, 9 Id. 161; **Weld** *v.* **Williams**, 13 Metc. 486; **Adams** *v.* **Cruft**, 14 Pick. 16; **Kennedy** *v.* **Kennedy**, 5 Dutch. 186; **Den** *v.* **Baldwin**, 1 Zab. 395; **Wendell** *v.* **Crandall**, 1 N. Y. 491, affirming 2 Denio 9; **Linn** *v.* **Alexander**, 59 Penna. St. 43; **Duer** *v.* **Boyd**, 1 Serg. & R. 203; **Manchester** *v.* **Durfee**, 5 R. I. 549; **Cooper** *v.* **Coursey**, 2 Coldw. 416; **Seldon** *v.* **King**, 2 Call 61; **Thomason** *v.* **Andersons**, *ubi supra;* **Folk** *v.* **Whitley**, 8 Ired. L. 133; **Sydnor** *v.* **Sydnors**, 2 Munf. 263; **Tidball** *v.* **Lupton**, 1 Rand. (Va.) 194; and that notwithstanding it be followed by a *habendum* to the first taker "and his heirs forever," **Corbin** *v.* **Healy**, 20 Pick. 514; or by the clause, "which said estate I hereby devise to A her heirs and assigns forever,"

In the one case the land devolves upon the male issue and (unless the tenure be gavelkind or Borough-English,) (*a*) according to the law of primogeniture, in the other upon the females as coparceners. If the estate tail be general, it will run in this manner through both lines, in their established order of succession.

What informal expressions create an estate tail.

But though these are the correct and technical terms of limiting an estate tail, yet such an estate may be created in a will by less formal language; indeed by any expressions denoting an intention to give the devisee an estate of inheritance, descendible to his or some of his *lineal*, but not to his *collateral* heirs, which is the characteristic of an estate tail as distinguished from a fee simple. The former is transmissible to *lineal* descendants only; the latter in default of lineal devolves to *collateral* and now to ascendant heirs.

Limitation to "heirs male," or "right heirs male, forever,"

A devise to A and his heirs male forever, (*b*) or to A and his heirs male living to attain the age of twenty-one, (*c*) or to A for life, and after his death to his heirs male, or his right heirs male, forever, (*d*) has been held to confer an estate tail male; the addition of the word "male," as a qualification of "heirs," showing that a class of heirs less extensive than heirs general was intended. (*e*) [Of course a devise to A for life with remainder to his right heirs by a particular wife forever gives A an estate tail special, "heirs by" a particular wife being equivalent to "heirs of the body by" a particular wife.] (*f*)

—or to heirs by a particular wife.

*It has even been decided that a devise to one, *et hæredibus suis*

Den *v.* Zabriskie, 3 Gr. (N. J.) 404; but see Den *v.* Pierson, 1 Harr. (N. J.) 181, subsequently reversed; or by a limitation over on his "death without lawful *children*," Monroe *v.* Douglass, 5 N. Y. 547. By the statute of 1827, in Michigan, estates tail were changed into allodial estates, Fraser *v.* Chene, 2 Mich. 81. A devise to testator's sons, "and after his decease * * * to become the property of the said G.'s *male heirs*," gave an estate tail to G. Ib.

But where the words would create an estate tail if used as to real estate, they will vest the absolute property in the devisee if used as to personalty, Coon *v.* Rice, 7 Ired. L. 217.

(*a*) See Trash *v.* Wood, 4 My. & Cr. 324; [Roe d. Aistrop *v.* Aistrop, 2 W. Bl. 1228; Anon., Dy. 179 b, pl. 45.]

(*b*) Baker *v.* Wall, 1 Ld. Raym. 185, 1 Eq. Cas. Ab. 214, pl. 12, stated *ante* p. *76.

(*c*) Doe d. Tremewen *v.* Permewen, 3 Per. & D. 303, 11 Ad. & Ell. 431.

(*d*) Lord Ossulston's Case, 3 Salk. 336; Doe d. Earl of Lindsey *v.* Colyear, 11 East 548.

[(*e*) The line of descent of lands cannot be qualified, except through the medium of an entail, Co. Lit. 27 b.

(*f*) Wright *v.* Vernon, 2 Drew. 439, 7 H. L. Cas. 35, 4 Jur. (N. S.) 1113.]

legitime procreatis, creates an estate tail, (*g*) though the addition merely describes a circumstance which is included in the definition of heir simply, an heir being *ex justis nuptiis procreatus*. Such was the doctrine of the early authorities, and it was recognized and followed in Nanfan *v.* Legh, (*h*) where a devise to H. when he should attain twenty-one, "and to his heirs *lawfully begotten* forever," was held to make the devisee tenant in tail only. In the same will other property was devised to H. and his heirs simply, which it was contended afforded an argument in favor of construing the devise in question to give an estate tail; inasmuch as the testator, in varying the phrase, must have had a different intention. Being a case out of chancery, we are not in possession of the reasons upon which the opinion of the court was founded; but probably it was considered that the testator, by adding the expression "lawfully begotten," intended to engraft *some* qualification on the description of heir, and consequently must have meant an estate tail. [In Good *v.* Good, (*i*) Lord Campbell, C. J., said it was a rule of construction long established and universally recognized, that such words created an estate tail. But the words "lawful heirs" standing alone will not be construed heirs of the body. (*j*)

To A and "his heirs *lawfully begotten*."

To A and his "lawful heirs."

A devise to A, with a direction that neither he nor his heirs *to the third generation* should mortgage or sell the devised property, will, it seems, create an estate tail. (*k*) And a devise "to the first and other sons of A successively according to priority of birth and their respective heirs forever," was held to give the sons successive estates in tail, as the only way of satisfying the intention that they should take in succession.] (*l*)

"Heirs to the third generation."

To several and their heirs "successively."

It is clear that the words "*heir* of the body" (in the singular) operate as words of limitation, and consequently confer an estate tail. Thus, it has been held that under a devise to A for life, and after his decease to the heir of his body forever, A is tenant in tail; (*m*) and a devise to A and such heir of

To heir of the body in the singular.

(*g*) Church *v.* Wyatt, Moore 637, Co. Lit. 20 b, Harg., n. 2.

(*h*) 2 Marsh. 107, 7 Taunt. 85.

[(*i*) 7 Ell. & Bl. 295.

(*j*) Matthews *v.* Gardner, 17 Beav. 254; Simpson *v.* Ashworth, 6 Beav. 412; and see Stratford *v.* Powell, 1 Ba. & Be. 1; but see per Bushe, C. J., in Moffet *v.* Catherwood, Alc. & Nap. 472.

(*k*) Mortimer *v.* Hartley, 6 Ex. 47, 3 De G. & S. 316; but see S. C., 6 C. B. 819, *contra*.

(*l*) Hennessey *v.* Bray, 33 Beav. 96, and *post* ch. XL., § 3.]

(*m*) Pawsey *v.* Lowdall, Sty. 249, 273. See also Wilkins *v.* Whiting, 1 Bulst. 219,

her body *as shall be living at her decease, (n) [or to A and his heir male living to attain twenty-one, and for want of such issue male the inheritance to go over,] (o) has received the same construction.

Limitation to next or first heir male.

Nor is the effect varied by the word *next* or *first* being prefixed to "heir." Thus, in Burley's Case, (p) a devise to A for life, remainder to the *next* heir male; for default of such male heir, then to remain, was adjudged to give an estate tail male to A. So, where (q) the devise was to M. and his wife for their lives, remainder to the *next* heir male of their two bodies, it was held that M. and his wife were tenants in tail male. Again, a devise to A for life, and after his death to the *first* heir male of his body, remainder over, has been adjudged to create an estate tail male. (r)

To "next heir male," with superadded words of limitation.

But though a devise to the *next* heir male simply, following a devise to the ancestor for life, does not confer on the heir an estate by purchase (the words being construed as words of limitation), yet if the testator has engrafted words of limitation on the devise to the next heir male, he is considered as indicating an intention to use the term "heir" as a mere *descriptio personæ;* in other words, as descriptive merely of the individual who fills the character of heir male at the ancestor's decease; the superadded words of limitation having the effect of converting the expression "next heir male" into words of purchase, an effect, however, which (as will be shown at large in the sequel) does not, in general, belong to such superadded expressions of this nature. This rule of construction is founded on the authority of Archer's Case, (s) where lands were devised to A for life, and after to the next heir male and the heirs male of the body of such next heir male, and it was unanimously agreed by the court that this was a contingent remainder to the heir, and that A was but tenant for life, and he having made a feoffment of the devised lands, it was held that such contingent remainder was destroyed.

To next heir male and the heirs male of his body.

But it should seem that this construction is not peculiar to such a

1 Roll. Ab. 836; [Clerk *alias* Cheek *v.* Day, Cro. Eliz. 314;] White *v.* Collins, 1 Com. Rep. 289.

(n) Richards *v.* Bergavenny, 2 Vern. 324.

[(o) Doe d. Tremewen *v.* Permewen, 3 Per. & D. 303, 11 Ad. & Ell. 431.]

(p) Cited 1 Vent. 230.

(q) Miller *v.* Seagrove, Rob. Gavelk. 122, 16 Vin. Ab., Parols (H), pl. 4, n.; and see 1 Ves. 337.

(r) Dubber d. Trollope *v.* Trollope. Amb. 453, Lee temp. Hardw. 160; and see Goodright *v.* Pullyn, 2 Ld. Raym. 1437, 2 Stra. 729; [O'Keefe *v.* Jones, 13 Ves. 412.]

(s) 1 Rep. 66.

case as Archer's; namely, where the word "next" is prefixed, and words of limitation are superadded to "heir male;" *for a similar construction was adopted in Willis *v.* Hiscox, (*t*) where the former circumstance was wanting. The devise was upon trust for the testator's son W. for life, and after his decease for the heir male of his body begotten on an European woman, and the heirs of such heir male, and in case the son should die without leaving such heir male of his body, the trustees were to pay the rents equally between the testator's daughters M. and A. for their lives, and the whole to the survivor; and after the decease of the survivor, upon trust for the heir male of the body of M. and the heirs of such heir male, and in default of such heir male of her body, upon trust for the *heir male of the body of A. and the heirs of such heir male.* W. and M. both died without issue; after which A., conceiving herself to be tenant in tail, suffered a recovery. A bill was filed by the heir male of the body of A. to compel a conveyance from the trustee; and Lord Cottenham considered his title so clear that he not only decided in his favor, but compelled the defendant trustee to pay the costs (*u*) of the suit which was occasioned by his refusal to convey without the direction of the court. His lordship said, "The mother has an estate expressly for life; and after her death the devise is to the heir male of her body, in the singular number, with words of limitation to the heir general of such heir, which, it is clearly settled, gives an estate for life only to the parent, and the inheritance by purchase to the heir of the body, as was decided in Archer's Case (*x*) and assumed by Hale in King *v.* Melling (*y*) and subsequent cases. If, indeed, that proposition were doubtful as a general rule, all doubt would have been removed in the present case; for the words of the limitation are the same as those used in the prior devise to the testa-

"To heir male of the body," and his heirs.

(*t*) 4 My. & Cr. 197.

Remark on Willis v. Hiscox.—(*u*) This seems rather hard upon the trustee, as there was no authority directly in point, and the cases which had decided that a devise to the heir of the body (in the singular) of the devisee for life, without words of limitation engrafted thereon, operated to confer an estate tail (*ante* p. *325), and also that superadded words of limitation had no effect in turning heirs male, in the plural, into words of purchase, afforded an argument in favor of the construction which the court rejected, sufficiently plausible, one should have thought, to justify the trustee's refusal to convey without judicial sanction. The tendency of such decisions is to increase the reluctance which is now very commonly felt by cautious and well-informed persons to take trusteeships.

(*x*) 1 Rep. 66.

(*y*) 1 Vent. 214; and see Fearne C. R., p. 148.

tor's son; and the particular description of the heir of that son proves that he must have taken by purchase."

[To have this effect, however, the superadded words must be distinct words of inheritance. For, as we have seen, a devise to *A for life, remainder to the heir of his body *forever*, makes A tenant in tail; the word "forever," though capable of creating a fee, being insufficient to show that the heir was intended to be a new *stirps*. (z) But it is not necessary, as sometimes contended, that the superadded words should change the course of descent. This appears from Archer's Case itself, and was expressly so decided by Sir R. Kindersley, V. C. (a) Nor is it necessary that the first estate should be expressly an estate for life: a devise "to A and the heir male of his body, and the heirs and assigns of such heir male," gives A an estate for life merely, with a contingent remainder in fee to his heir male. (b)

"To heir male of the body for life."

Again, a devise to A for life, and after his death "to the heir male of his body lawfully begotten, *during his life*," gives A an estate for life, with remainder for life to the person who at his death happens to be his heir male.] (c)

To A "*et semini suo*," or to A "and his issue," or "offspring," or "family according to seniority."

A devise to A *et semini suo*, (d) or to A and his issue, clearly creates an estate tail, as is shown more at large in a subsequent chapter. (e) [A devise to A and his offspring, (f) and a devise to A and his family according to seniority, (g) have also been held to create an estate tail general.]

So, where a testator, in the first instance, devises lands to a person and his heirs, and then proceeds to devise over the property in terms which show that he used the word "heirs" in the prior devise in the restricted sense of heirs of the body; such devise, of course, confers only an estate tail, the effect being the same as if the latter expression had been originally employed. Thus, if lands are devised to A, or to

[(z) Pawsey v. Lowdall, Sty. 249, 273, stated above. See also Fuller v. Chamier, L. R., 2 Eq. 682, 35 L. J., Ch. 774; the latter report supplies the material information that the devisees for life were treated as joint tenants notwithstanding the words "equal shares;" so that the entire property was in the sole survivor.

(a) Greaves v. Simpson, 33 L. J., Ch. 641, 10 Jur. (N. S.) 609.

(b) Chamberlayne v. Chamberlayne, 6 Ell. & Bl. 625.

(c) White v. Collins, 1 Com. Rep. 289.]

(d) Co. Lit. 9 b.

(e) Ch. XXXIX.

[(f) Young v. Davies, 2 Dr. & Sm. 167.

(g) Lucas v. Goldsmid, 29 Beav. 657. "To A and his family" simply, gives a fee simple, *ante* p. *274.]

A and his heirs, and if he shall die without heirs of his body, or without heirs male of his body, or without an heir or an heir male of his body, then over to another, such devise vests in the devisee an estate tail general, or an estate tail male, as the case may be.[2] (*h*)

To A and his heirs, and if he shall die without heirs of his body.

2. In general, where an estate is limited over on the death of the first taker without issue, the first taker has an estate tail, Osborne *v.* Shrieve, 3 Mason C. C. 391; Parkman *v.* Bowdoin, 1 Sumn. C. C. 359; Williamson *v.* Daniel, 12 Wheat. 568; Dart *v.* Dart, 7 Conn. 250; Waples *v.* Harman, 1 Harring. 223; Fisk *v.* Keene, 35 Me. 349; Chew *v.* Chew, 1 Md. 163; Laidler *v.* Young, 2 Harr. & J. 69; Smith *v.* Smith, 2 Id. 314; Keys *v.* Goldsborough, 2 Id. 369; Pratt *v.* Flamer, 5 Id. 10; Bells *v.* Gillespie, 5 Rand. (Va.) 273; Mocklen *v.* Clagett, 2 Harr. & McH. 1; Hawley *v.* Northampton, 8 Mass. 3; Hurlburt *v.* Emerson, 16 Mass. 241; Allen *v.* Trustees, 102 Mass. 262; Albee *v.* Carpenter, 12 Cush. 382; Hayward *v.* Howe, 12 Id. 51; Hall *v.* Priest, 6 Gray 18; Steel *v.* Cook, 1 Metc. 281; Parker *v.* Parker, 5 Id. 134; Terry *v.* Briggs, 12 Id. 17; Jordan *v.* Roach, 32 Miss. 481; Den *v.* Clark, Coxe 340; Moore *v.* Rake, 2 Dutch. 574; Den *v.* McMurtrie, 3 Gr. (N. J.) 276; Den *v.* Small, 1 Spencer 151; Chetwood *v.* Winston, 11 Vroom 337; Jackson *v.* Van Zandt, 12 Johns. 169; Ross *v.* Toms, 4 Dev. L. 377; Saunders *v.* Hyatt, 1 Hawks 247; George *v.* Morgan, 16 Penna. St. 95; Pierce *v.* Hakes, 23 Penna. St. 231; Hansell *v.* Hubbell, 24 Id. 244; Wynn *v.* Story, 38 Id. 166; Allen *v.* Henderson, 49 Id. 333; Paxson *v.* Lefferts, 3 Rawle 59; Duer *v.* Boyd, 1 Serg. & R. 203; Amelong *v.* Dorneyer, 16 Serg. & R. 323; Irwin *v.* Dunwoody, 17 Id. 61; Heffner *v.* Knapper, 6 Watts 18; Eichelberger *v.* Barnitz, 9 Id. 447; Sharp *v.* Thompson, 1 Whart. 139; Durden *v.* Burns, 6 Ala. 368; Mainwaring *v.* Taber, 1 Root 79.

A devise to a son, and, if he die without issue, to testator's "other children," gives the son an estate tail, Fisk *v.* Keene, 35 Me. 349; Tate *v.* Tally, 3 Call 354; Sleigh *v.* Strider, 5 Id. 439; Tinsley *v.* Jones, 13 Gratt. 289; so to A, and "if he die without heirs," over to collateral heirs, Doe *v.* Lampleugh, 3 Houst. 469; so devises to A and B, their heirs and assigns, and "if either die leaving no heirs of his body," to the other, Hawley *v.* Northampton, 8 Mass. 3; so a devise to P., "but should she die without heirs of her own body," to the brother and brother-in-law of P., See *v.* Craigen, 8 Leigh 449; so a devise to A for life "if she shall not leave issue at her death, but if she shall leave lawful issue at her death, * * * to her heirs forever in fee simple," Price *v.* Taylor, 28 Penna. St. 95.

For a full review and discussion of the Pennsylvania cases on this subject, the reader is referred to a short but valuable treatise by Mr. Edward A. Anderson on "The Word Issue," Phila., 1878.

For limitations over by way of executory devise on definite failure of issue, see chapter XXVIII., *supra*.

As to whether a failure of issue shall be construed to be definite or indefinite, see chapter XLI., *infra*.

(*h*) Tracy *v.* Glover, cit. 3 Leon. 130, pl. 183, Godb. 16; and see Blaxton *v.* Stone, 3 Mod. 123; Denn *v.* Slater, 5 T. R. 335. [The rule is also applicable to deeds, Co. Lit. 21 a. **Devise over on death without issue gives estate tail.**—And in wills it holds where the devise over is if the prior devisee "die without issue," Browne *v.* Jerves, Cro. Jac. 290; Chadock *v.* Cowley, Id. 695; Doe d. Neville *v.* Rivers, 7 T. R. 276; Doe d. Ellis

Direction to grant a fee farm rent not conclusive against an estate tail.

*Indeed so well has this been settled from an early period, that to found an argument in favor of a contrary construction, recourse is always had to special circumstances. Thus, where (*i*) a testator devised lands to his wife for life, and after her death to J. his eldest son and his heirs, upon condition that J., as soon as the land should come unto him in possession, should grant to S. testator's second son and his heirs an annual rent of £4, and that *if J. should die without heirs of his body* the land should remain to S. and the heirs of his body; it was contended that the intent was shown that J. should have a fee, otherwise he could not legally grant such a rent to have continuance after his death; but it was resolved to be an estate tail; for being limited that if he died without issue then it should be to S. and his heirs of his body, *showed what heirs of J. were intended*, viz., *heirs of his body;* and though he was to make a grant of the rent, yet this, being by appointment of the donor, was not *contra formam donationis*, but stood with the gift, and it should bind the issue in tail. The court evidently considered the direction to grant the fee farm rent as conferring *a power*, or rather, perhaps, a trust coupled with a power, in which view it was consistent with an estate tail.

Devise over on failure of heirs to a person in line of descent creates estate tail.

And here it should be observed that where real estate is devised over in default of *heirs* of the first devisee, and the ulterior devisee stands related to the prior devisee so as to be in the course of descent from him, whether in the lineal or collateral line and however remote, as the prior devisee in that case could not die without heirs while the devisee over exists, the word "heirs" is construed to mean heirs *of the body*, and accordingly the estate of the first devisee, by the effect of the devise over, is restricted to an estate tail, and the estate of the devisee

v. Ellis, 9 East 382; Biddulph *v.* Lees, Ell., Bl. & Ell. 289; and see *ante* ch. XVII., § 6. In Cane *v.* James, cit. Skinn. 19, where the devise was to A and his heirs, and if A die without heirs of his body that his sister should have £600, it was held that A took the fee. It will be observed that there was no devise over of the land itself. Unless coupled with another contingency.—But if the dying without heirs male or without issue be coupled with any other contingency, as "dying without heirs male in the lifetime of A," the first devisee takes not an estate tail, but an estate in fee, with an executory devise over, Pells *v.* Brown, Cro. Jac. 590; Eastman *v.* Baker, 1 Taunt. 179; Denn *v.* Kemeys, 9 East 366; Doe *v.* Chaffey, 16 M. & Wels. 656, *ante* p. *75; and see *post* ch. XLI., § 2.] As to the effect of stat. 1 Vict., c. 26, on devises of the above kind, see vol. I., p. *560, and *post* ch. XLI., § 4.

(*i*) Dutton *v.* Engram, Cro. Jac. 427.

over becomes a remainder expectant on that estate. (*k*) This con*struction is induced by the evident absurdity of supposing the testator to mean that his devise over should depend on an event which cannot happen without involving the extinction of its immediate object.

Otherwise where to a stranger in blood.

But the court will not so construe the word heirs where the devise over is to a stranger, however plausible may be the conjecture that it was so intended, and consequently the devise over is void for remoteness; (*l*) and formerly a relation of the half-blood or a parent or grandparent was, for this purpose, considered as a stranger, such persons being then excluded from taking [directly] by descent; (*m*) but the law, at least as to persons dying since the 31st of December, 1833, is now regulated by the statute 3 and 4 Wm. IV., c. 106, which has admitted relations of the half-blood, and parents and other ancestral relations in the ascending line, to the heirship. (*n*)

To several, one of whom is a stranger in blood.

[In Harris *v.* Davis, (*o*) the gift over in default of heirs of the first devisee was to several other persons, *one of whom* was not related to the first devisee, but as all the others were related to him, he was held to take an estate tail. It would seem, therefore, sufficient to give the first devisee an estate tail that *any one* of a number of devisees over was related to him.]

As to limitation over to the right heirs of the devisee.

Of course the limiting of the estate over, in default of heirs of the body or issue, to the right heirs of the devisee, does not vary the construction further than to give the devisee the remainder in fee expectant on the estate tail. Thus, where (*p*) a testator devised certain lands unto his son P. and his heirs forever, on condition that he paid W. £30 within one year after the death of the testator's wife, and he gave other tenements to other sons, adding the following clause:—" Item. My will and mind is, that in

(*k*) 1 Roll. Ab. 836; 2 Lev. 162; Cro. Jac. 416; 1 Freem. 74; 2 Eq. Cas. Ab. 306, pl. 2; 3 Lev. 70; 2 Stra. 849; Amb. 363; 2 Ed. 297; Cas. temp. Talb. 1; Willes 164, 369; 1 P. W. 23; Doug. 266; Cowp. 234; 3 T. R. 491, 488, n.; 2 Marsh. 170, 6 Taunt. 485; 6 Beav. 412. A few early decisions to the contrary, such as Hearn *v.* Allen, Cro. Car. 57, are overruled by the current of authorities.

(*l*) Grumble *v.* Jones, 2 Eq. Cas. Ab. 300, pl. 15, 11 Mod. 207, Willes 166, n., 1 Salk. 238, *nom.* Aumble *v.* Jones; Att.-Gen. *v.* Gill, 2 P. W. 369; Griffiths *v.* Grieve, 1 J. & W. 31.

[(*m*) Tilburgh *v.* Barbut, 1 Ves. 88, 3 Atk. 617; and] see Preston d. Eagle *v.* Funnell, Willes 164; [Moffet *v.* Catherwood, Alc. & Nap. 472.]

(*n*) See 1 Hayes' Introd. (5th ed.) p. 319.

[(*o*) 1 Coll. 416.]

(*p*) Brice *v.* Smith, Willes 1.

case any of my said children unto whom I have bequeathed any of my real or copyhold estates *shall die without issue*, then I give the estate of him or her so dying unto his or their *right heirs* forever;" and it was held that the children took estates tail, with remainder in fee to themselves.

Estate tail general cut down to an estate tail special by implication.

Sometimes an estate tail general is cut down to an estate tail special by implication. As where (*q*) the devise was to the use *of the testator's eldest son John and his heirs forever, and failing issue of John, to the use of James the second son and his heirs forever, and failing issue of that son, to the use of the third son George and his heirs forever, and failing his issue, to the use of every other son the testator should or might have, according to priority of birth; *and failing his (testator's) issue male*, then to his *issue female* and their heirs forever, *and for want of issue female*, then to the use of his (the testator's) heirs forever: it was argued that the testator evidently intended to postpone the female to the male line of issue, and that the latter part of the will was explanatory of the devise to the sons, showing that they were to take estates tail male only; for that the intent of postponing the issue female could not be answered without postponing his granddaughters as well as daughters, who were both comprehended under the general expression of his issue female; and of this opinion appears to have been the House of Lords, confirming a decree of the Irish Court of Exchequer. (*r*)

(*q*) Fitzgerald *v.* Leslie, 3 B. P. C. Toml. 154. This seems to be the converse of Tuck *v.* Frencham, Moore 13, pl. 50, 1 And. 8, and Doe d. Hanson *v.* Fyldes, Cowp. 833, stated vol. I., p. *485.

[(*r*) But there would be obvious difficulty in working out the case on this principle; for *pari ratione* the daughters should have taken estates tail female. The case is mentioned doubtingly by Lord St. Leonards, 4 H. L. Cas. 280.]

This chapter, it is obvious, does not exhaust the general subject of which it professes to treat. The numerous instances in which the words *heirs of the body*, accompanied by explanatory expressions, and the words *children*, *son* and *issue* have operated to confer an estate tail, are fully discussed in subsequent chapters, to which, therefore, the reader is referred.

*CHAPTER XXXVI.

RULE IN SHELLEY'S CASE.

I. *Nature of the rule.—Requisites to its Operation; considered in regard to the Estate of Freehold,—in regard to the Limitation to the Heirs.—Questions where one or both of the Limitations relate to* several *Persons.*
II. *Executory Trusts.*
III. *Practical Effect of the Rule considered.*

I.—The rule in Shelley's Case is a rule of law, and not of construction. (*a*) The rule simply is, that, where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs or the heirs of his body, the word *heirs* is a word of limitation, *i. e.*, the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee tail; if to his heirs general, a fee simple. (*b*) [1]

Nature of the rule in Shelley's Case.

(*a*) The comprehensive nature of the present work renders it impossible to present more than a brief outline of the chief practical points connected with the rule in Shelley's Case, which require the attention of the student or the practitioner; and this plan is the more willingly submitted to, since the subject has received an elaborate investigation from several writers, who have brought great learning and abilities to the task.

(*b*) Shelley's Case, 1 Rep. 93, 104 a. The question was not directly raised in this case, but was incidentally much discussed. See some observations on the nature and origin of the rule, Fea. C. R., and Hayes' Supplem.; Prest. Est., vol. 1, c. 3. See also Earl of Bedford's Case, Moore 718; Whiting *v.* Wilkins, 1 Bulstr. 219; Rundale *v.* Eeley, Cart. 170; Broughton *v.* Langley, 2 Ld. Ray. 873, 2 Salk. 679, and cases *passim* in the next chapter.

1. The rule in Shelley's Case has been abolished by statute in the following states: Alabama (Code 1876, § 2183); Connecticut (Rev. Stats. 1875, p. 352); Kentucky (Rev. Stats. 1877, p. 586); Maine (Rev. Stats. 1871, p. 559); Massachusetts (Gen. Stats. 1860, p. 466); Michigan (Comp. L. 1871, p. 1327); Minnesota (Stats. at Large 1873, p. 615); Missouri (Rev. Stats. 1872, p. 1370); New Hampshire (Gen. L. 1878, p. 455, as to devises only); New Jersey (1 Rev. Stats. 1877, p. 299, as to devises only); New York (Rev. Stats. 1876, p. 1103); Ohio (Rev. Stats. 1869, p. 1626, as to devises only); Oregon (Laws 1872, p. 791); Rhode Island (Gen. Stats. 1872, p. 373); Tennessee (Code 1858, § 2008); Virginia (Code 1873, p. 889); West Virginia (Code 1868, p. 461); Wisconsin (Rev. Stats. 1858, c. 83, § 28).

[The rule is usually stated in the above general terms, but by the word "limitation," we must understand a limitation by way of remainder, as distinguished from a limitation by way of executory devise or a shifting use, which, though

Only applies to limitations by way of remainder.

As to the effect of the statute in the respective states see Lippitt v. Huston, 8 R. I. 415; Hampton v. Rather, 30 Miss. 193; Powell v. Brandon, 24 Miss. 343; Dennett v. Dennett, 43 N. H. 500. In Ohio, the forty-seventh section of the act of 1840, and the fifty-third section of the present act, forbid the application of this rule only where the evident intention of the testator would be defeated thereby, Carter v. Reddish, 32 Ohio St. 1. In Massachusetts the rule was done away as to wills in 1791, as to deeds in 1821, Loring v. Eliot, 16 Gray 568; Steel v. Cook, 1 Metc. 281. In Maryland it remains the law, Ware v. Richardson, 3 Md. 505; Simpers v. Simpers, 15 Md. 160; Griffith v. Plummer, 32 Md. 74; Thomas v. Higgins, 47 Md. 439. So, too, in Indiana, Doe v. Jackman, 5 Ind. 283; Small v. Howland, 14 Ind. 592; Hull v. Beals, 23 Ind. 25; Locke v. Barbour, 72 Ind. 577; Gonzales v. Barton, 45 Ind. 295; Andrews v. Spurlin, 35 Ind. 262. By force of the recent statutes of Illinois, a devise to A for life, with remainder to the heirs of her body after her decease, now gives but a life estate to A, estates tail being put without the reach of the rule in Shelley's Case, Butler v. Huestis, 68 Ill. 594; Baker v. Scott, 62 Id. 86. So in Georgia, Dudley v. Porter, 16 Ga. 618. And in many states the statutes doing away with estates tail have abrogated the rule in Shelley's Case as to them. See statutes referred to in the preceding chapter, note 1. See also as to the rule in Shelley's Case, and the changes made in it by American statutes, Wms. R. P. (4th Am. ed.) 249, n.; 2 Washb. R. P. 561. Reference is again made to Mr. Anderson's treatise on "The Word Issue," for a careful review of all the many Pennsylvania cases on this subject.

As to the applicability of the rule in Texas, see Hawkins v. Lee, 22 Tex. 545. In Vermont the rule is not in force, Blake v. Stone, 27 Vt. 475; Smith v. Hastings, 29 Id. 240; nor in Kentucky, Riggins v. McClellan, 28 Mo. 23; nor in Missouri, as to wills since 1825, nor as to conveyances since 1845, Ib. As to its applicability in Virginia, see Roy v. Garnett, 2 Wash. (Va.) 9; Moore v. Brooks, 12 Gratt. 135.

The rule has been productive of much discussion by the bench, both in England and the United States. The proper application of the rule in Vermont has been commented upon by one of the ablest jurists of America, to the following effect: In Blake v. Stone, 27 Vt. 475, 476, it was said by Redfield, C. J.: "And as we have a statutory system of conveyance or transmission of the title of real estate, wherein we have more or less explicitly departed from many of the common law provisions upon the subject, it deserves serious consideration, in my judgment, whether we should make any distinction between a covenant to convey, a will, or devise, and a deed, in regard to the indispensable necessity of the use of the word heirs, to create a fee simple or fee tail, or whether that word is always to be regarded as one of limitation, and never of purchase, in a deed, without reference to the clearly expressed intention of the parties. The question as it affects deeds will, probably, ultimately settle down upon the same basis it has at common law, in regard to covenants and devises, as one of intention merely. Justice Wilmot says, in Long v. Laming, 2 Bur. 1100, 'Now it is certain that in some cases, and under some circumstances, they (the words heir and heirs) may be construed words of

it be to the heirs of a person taking a previous estate of freehold, vests in the heir as a purchaser.] (c)

purchase, either upon a *will* or upon a *deed*.' And to this effect he cites two cases, Lisle *v.* Gray, found in Sir Th. Jones 114; 2 Levinz 223; Pollex. 582; Th. Raymond 278; and Waker *v.* Snowe, in Palmer's R. 359, and concludes, 'They are not to be construed as words of limitation, either upon a will or upon a deed, when the manifest intention of the testator or of the parties is declared to be, or clearly appears to be, that they shall not be so construed.' This is sufficiently explicit; but however sensible and sound, as a rule of exposition, it has not generally obtained in England, in regard to deeds, but always as to covenants to convey, and wills, and no doubt will ultimately, everywhere, in regard to deeds, as every one feels the absurdity of any such distinction between deeds and other instruments. But it does not seem to us necessary to put this case upon the broad ground of intention merely. The English cases treat this case as an exception. The case of King *v.* Melling, 1 Ventris 231, where the devise was to one for life, *et non aliter*, and this was held sufficient to give only a life estate, in the first grantee. So, too, Archer's Case, without negative words, but only because the remainder is given over to the heir male in the singular number, regards the heir as taking by purchase and not by inheritance. And Bagshaw *v.* Spencer, before Lord Hardwicke, 2 Atkins 577, and 1 Vesey 142, is decided as conveying to the first grantee only a life estate, because the words 'without impeachment of waste' are used, which have no application to an estate of inheritance. But if such words may determine the extent of the estate, so may others equally indicative of intention." Again, in Smith *v.* Hastings, 29 Vt. 240, 242, the same learned judge says: "This question seems to involve, to some extent, the rule in Shelley's Case, 1 Coke 93. This question was somewhat examined in a late case, Blake *v.* Stone, 27 Vt. 475. It was there considered that the rule in Shelley's Case was to be regarded as of no special force in this state, except as one of construction and intention. This was the view taken of the same rule in England by Lord Mansfield and Justice Wilmot, in Doe *v.* Laming, 2 Burrows 1100, and by Justice Blackstone, in Blake *v.* Perrin, 4 Burrows 2579. This is that celebrated case so long pending in the King's Bench and Exchequer Chamber upon the extent of the rule in Shelley's

[(c) Lloyd *v.* Carew, Pre. Ch. 72, Show. P. C. 137; per Lord Cranworth, C., Coape *v.* Arnold, 4 D., M. & G. 589; Fea. C. R. 276; Gilb. Uses 21; Hayes on Limitations 4, 51, 52. This was questioned by Malins, V. C., in White and Hindle's Contract, 7 Ch. D. 203. In this case Crofts *v.* Middleton, 2 K. & J. 194, was cited *arg.* as deciding that under a devise to A for life, remainder to her children in fee, with alternative remainder to her heirs if (as happened) she should have no children, the life estate and the remainder to her heirs would not coalesce. This is, of course, not law, and found no favor with Malins, V. C.; nor was it, indeed, so laid down or suggested in the case cited. The question there was whether the remainder to the heirs, which, by the operation of the rule in Shelley's Case, was executed in A, was vested or contingent. Wood, V. C., held that it was contingent, and, consequently, that A, being *feme coverte*, had not effectually disposed of it by the means she had used. On appeal (8 D., M. & G. 192) the question whether the remainder was vested or contingent was left undecided; as to which see Egerton *v.* Massey, 3 C. B. (N. S.) 338, *ante* vol. I., p. *650.]

*The rule is well illustrated in the celebrated case of Perrin *v.* Blake. (*d*) There A by his will declared that if his wife should be *enceinte* with a child at any time thereafter (but

Perrin v. Blake.

Case, that when the ancestor by any conveyance takes an estate for life, with remainder mediately or immediately to his heirs, in fee or in tail, the estate shall vest absolutely in the first grantee or devisee, and no estate remain which is secured by the deed to the heirs; in other words, the term *heirs* in such case is to be regarded as one of *limitation* and not of *purchase*. The court here were so divided that the case was not decided. And the amount of discussion and acrimonious controversy which ensued upon the subject is almost incredible. And Lord Campbell says in his Life of Lord Mansfield that even to this day nothing will so readily provoke debate among English lawyers as to start the query whether Perrin *v.* Blake was rightly decided by the majority of the King's Bench. But it seems to have been held in England that when the language of the instrument manifested a clear intention to have the estate pass to the heirs, and that the ancestor should take only a life estate, it should be allowed to have that operation, certainly where this is unquestionably so expressed. It is indeed held in England that all doubts shall in such case be solved against such construction. But this extreme rule of construction in favor of the absolute right of the ancestor to alien the property is obviously a rule of policy merely, and has been supposed to derive its chief support from considerations having their origin in the feudal tenures of the realm. But here no such considerations can have weight. And as our system of conveyancing is statutory, there is no necessity and no reason in adopting any rule of construction which will tend to carry us one side of the true purpose and intention of the instrument. And this, says Prof. Greenleaf, 2 Cruise 381, and note, 'was deemed by the late lamented Judge Story to be generally adopted in the United States, where the subject was not regulated by statute.' See also 4 Kent's Com. 215, 233."

The courts of Pennsylvania give quite a different force to the rule, as appears from Guthrie's Appeal, 37 Penna. St. 9, 21, where Strong, J., says: "The rule in Shelley's Case is the law of Pennsylvania, but there is no reason why it should be applied more extensively than in the country from which it derived its birth. It often defeats the declared will of a testator, and it frustrates his purpose of making provision for more than one generation of his family. Still it is to be enforced whenever it is truly applicable. But it has been held from Wild's Case, 6 Coke, down to the present day, that when the devise of the remainder is not to 'heirs' or 'heirs of the body,' but to 'children,' they take as a new stock and not as heirs. In Goodtitle *v.* Herring, 1 East 164, there was a limitation for life, with a remainder to the 'heirs male of the body' of the tenant for life, severally, successively, one after another, as they and every of them should be in seniority of age and priority of birth, the elder of such sons and the heir male of his body being always preferred before the younger of such son or sons, and the heir male of his and their body and bodies, and for want of such issue then to the daughters, &c., and in default of such issue over. The description embraced the whole line of lineal heirs, preferring them in the order of common law descent, and they were described as 'heirs male of the body,' yet

(*d*) 4 Burr. 2579, 1 W. Bl. 672, 1 Coll. Jur. 283, Harg. Law Tracts, 489, n., Hayes' Inquiry 227, n.

which never happened), and it were a male, he devised his real and personal estate equally to be divided between the said infant and his

as they were also called sons, the latter designation overcame the force of the technical words of limitation, and the parent took but an estate for life: See also North *v.* Martin, 6 Sim. 266; Doe *v.* Provost, 5 Johns. 61; Gernet *v.* Lynn, 7 Casey 94. The latter case is very like the present. In it, the late Chief Justice Lewis remarks: 'It is, therefore, very clear that when the term children is used to designate the object of the testator's bounty, and some of them are *in esse* at the date of the will and also at the time it takes effect, neither the policy nor the words of the rule apply.' After a pretty thorough search, I have not been able to find a single such case in which the rule has been applied, prior to Williams *v.* Leech, 4 Casey 89, and even in that case there were no children of the first taker at the date of the will, nor even when it took effect. That case, however, does treat the word children as if it meant heirs in the will then before the court. It was followed by Naglee's Appeal, 9 Casey 89, a construction of the same will, and by McKee *v.* McKinley, 9 Casey 92. In the former of the cases, there was, in the first place, an absolute gift of the fee simple to the daughter of the testator, then unmarried, and without children. In a subsequent part of the will the testator provided that none of his children should sell or convey any of the real estate devised to them, but enjoy it during life, and that after their death it should be divided equally among their children and their heirs. This was followed by a devise over to the surviving children, if either of his children should die 'without issue.' It might have been argued, though I think unsuccessfully, that the testator had used the words issue and the children as of the same import. The decision, however, was not put upon that ground. The will was regarded as a gift of the fee to the first taker, followed by an unavailing attempt to restrict alienation. It was also quite strongly intimated that it might be an estate tail in the daughter. The case of McKee *v.* McKinley was that of a devise for life, remainder to the children of the tenant for life, if any surviving, or issue of such children, and in case of no children or issue of children, then over to the relations and lawful heirs of the testator. This was held an estate in fee simple in the first taker.

The case was evidently an amicable one. There appears to have been no argument except in support of a tenancy in fee of the first taker, and the decision was by a bare majority of the court. Neither this case, nor that of Williams *v.* Leech, nor Naglee's Appeal, in the particulars of which we have spoken, is sustainable on authority. If they are to be regarded as the law of the land, the result must be a wide disturbance of titles, the foreshadowings of which are already to be seen, an extension of the rule in Shelley's Case far beyond all precedent, and an insuperable obstacle in the way of testators against making such settlements of their property as have been common ever since statutes of wills existed."

The rule is maintained in Illinois, in an able opinion by Breese, J., in Baker *v.* Scott, 62 Ill. 86, 93, where he says: "As we understand, one of the principal reasons for establishing this rule was to prevent the abeyance or suspension of the inheritance. The rule, therefore, is only applied to those limitations in which the word 'heirs' is used, on account of the maxim that *nemo est hæres viventis.* But the rule does not apply when the words lawful issue, issue, sons, or children are used instead of heirs. These words are regarded as words of purchase, for the reason that they are a designation of per-

son W., when the infant should attain twenty-one; and he declared it to be his intent that none of his children should dispose of his estate

sons to take originally in their own right. But when the limitation is to the heirs, it is, in legal intendment, as a class or denomination of persons to take in succession from generation to generation. 1 Prest. on Estates 265. As Lord Thurlow said in Brown *v.* Morgan, 1 Brown's Ch. R. 216, when the heir takes in the character of heir, he must take in quality of heir, and all heirs taking as heirs must take by descent. Since the solemn determination in Perrin *v.* Blake, in the Exchequer, the rule in question has been regarded as one of the most firmly established rules of property, and, strictly speaking, no instance can be adduced of a departure from it. * * * The requisites of the rule are, that there must, in the first instance, be an estate of freehold devised; there must be a limitation to the heirs or heirs of the body of the person taking that estate, by that name, and not the heirs as meaning or explained to be 'sons,' children, &c.; that these heirs must be named to take as a class or denomination of persons in succession from generation to generation, and by way of remainder, or at least so that the estate to arise from the limitation to the heirs, and the estate of freehold in the ancestor shall both owe their effect to the same deed, will, or writing; and that the several limitations shall give interests of the same quality, both legal and equitable. 1 Prest. on Estates 266. Testing the devise in this case by these requisites, no one will deny it fulfills them all. * * * That this rule was part of the common law of England, and an established axiom in the law of real property in that realm for near five hundred years, is not, and cannot be denied. 4 Kent's Com. 243. That it is law here, what more authoritative can be found than the act of our general assembly? * * * This law was enacted in 1845, having been first substantially enacted in 1819, and re-enacted in 1829, and again re-enacted in 1833, in the revision of that year. Here is an emphatic declaration of the people, speaking through their representatives in the general assembly, that 'the common law of England, so far as the same is applicable, shall be the rule of decision, and shall be considered of full force until repealed by legislative authority.' * * * The only question then must be, is this rule, which is admitted to be a rule of property of the common law, applicable to our condition, to the genius and spirit of our institutions, and to their purposes and objects? It is said by some courts of great respectability, that the rule was established by the courts of England in subserviency to the feudal policy prevailing at the time, and to the interest of the lords, whose feudal rights of relief, wardship, marriage, etc., would attach upon a transmission by purchase. Furman *v.* White's Heirs, 14 B. Mon. 560, 570. * * * If the rule was entirely of feudal origin, it is not, on that account, less binding on courts of justice, nor its authority the least diminished for that reason. * * * It has become a rule of property, and is, we believe, in harmony with the genius of our institutions, and with the liberal and commercial spirit of the age, which alike abhor the locking up and rendering inalienable real estate, and has challenged and received the willing obedience and support of the most able minds of England and the United States. How many estates may be depending in this state upon this rule, we can only conjecture, that there are very many there can be no doubt, which an arbitrary declaration by this court, of the inapplicability of the rule to our institutions, would unsettle and destroy. The courts of every state of this great Union in which the common law has

for longer than his life; and to that intent he devised all his estate to the said W. and the said infant, *for the term of their natural lives;*

been adopted, have, without exception, upheld this rule, and guided their decisions by it."

In a very recent case in Maryland it is said by Alvey, J.: "If there be anything settled in the law, it is that a devise to a person, and the heirs of his body lawfully begotten, creates an estate tail in the first taker, by operation of the rule in Shelley's Case; and it is equally well settled, by a multitude of cases, that a devise over, dependent upon an indefinite failure of issue of a prior devisee, is a contingency too remote to support a valid executory devise. In regard to these propositions there can be no question." Josetti *v.* McGregor, 49 Md. 202, 210.

The following cases have been held to be within the rule in Shelley's Case: To several "and their heirs lawfully begotten of their bodies," Johnson *v.* Johnson, 2 Metc. (Ky.) 331; or to A "and his heirs lawfully begotten," Paddison *v.* Oldham, 1 Harr. & McH. 336; or to children, "their heirs and assigns," Stires *v.* Van Rensselaer. 2 Bradf. 172; or "in trust for A, her heirs and assigns," Brown *v.* Alden, 14 B. Mon. 143; but see Burtis *v.* Doughty, 3 Bradf. 287; or for A "and the heirs of her body," McKenzie *v.* Jones, 10 Geo. (Miss.) 230; or in trust for A for life, after her death for her husband for life, and after his death for the heirs of the body of A, Davis *v.* Hayden, 9 Mass. 514; or for A for life, and after her death for the use of her heirs, Armstrong *v.* Zane, 12 Ohio 287; or to A for life, with remainder "*after his death* to the heirs male of his body," Hamilton *v.* Wentworth, 58 Me. 101; or to "his lawful heirs," Cipperly *v.* Cipperly, 40 How. Pr. 269; Fulton *v.* Harman, 44 Md. 251; or "to her oldest male heir," Brownell *v.* Brownell, 10 R. I. 509; or "to her heirs forever thereafter," Brislain *v.* Wilson, 63 Ill. 173; or the heirs of her body, Dott *v.* Cunningham, 1 Bay (S. C.) 453; Polk *v.* Faris, 9 Yerg. 209; Josetti *v.* McGregor, 49 Md. 202; or a like devise of a term of years, Horne *v.* Lyeth, 4 Harr. & J. 435; or to A, his heirs and assigns, with power of appointment, and in default of appointment trustee to hold "for his heirs and assigns," Ives *v.* Harris, 7 R. I. 413; or to A "and his heirs during his natural life," Brooks *v.* Evetts, 33 Tex. 742; or a devise to A for life, with remainder to his heirs, Steel *v.* Cook, 1 Metc. 281; Richardson *v.* Wheatland, 7 Id. 172; Roach *v.* Martin, 1 Harring. 548; or heirs of his body, Den *v.* Laquear, 1 South. 201; Den *v.* Baldwin, 1 Zab. 395; Wells *v.* Olcott, Kirby (Conn.) 118; Hamilton *v.* Hempstead, 3 Day 332; Laborde *v.* Penn, McMullen 448; Giddings *v.* Smith, 15 Vt. 344; Hinson *v.* Pickett, 1 Hill (S. C.) 37; or to A and B for life, and then to their lawful heirs, Auman *v.* Auman, 21 Penna. St. 343; so "to the heirs of her body share and share about," Watts *v.* Clardy, 2 Fla. 369; or to M., "and what remains at her death to be sold and equally divided among the heirs of her body," Thompson *v.* Mitchell, 4 Jones Eq. 441; Swain *v.* Rascoe, 3 Ired. L. 200.

A devise to A and to his oldest male heir forever is an estate tail, Cuffee *v.* Milk, 10 Metc. 366; so a devise to H. "for and during his natural life, and after his decease to his eldest son," gives H. an estate tail male, by force of the rule in Shelley's Case, Simpers *v.* Simpers, 15 Md. 160. Where a devise is to A "and his heirs, if he has any at his death," with a limitation over, if he has none, A takes an estate tail, Deboe *v.* Lowen, 8 B. Mon. 616; or "provided he leave an issue male or female," Den *v.* Emans, Penn. (N. J.) 967; so a devise to "A and his lawfully begotten heir forever," Den *v.* Cox, 4 Halst. 10; Hall *v.* Vandegrist, 3 Binn. 374; or A "and her

remainder to G. and his heirs for the lives of the said W. and the infant; remainder *to the heirs of the bodies of the said W. and the said*

bodily heirs," Middleton *v.* Smith, 1 Coldw. 144; or to "A and his heirs by his present wife," Den *v.* Pierson, 1 Harr. (N. J.) 181; or to A for life, "and at his death to be enjoyed by his heirs, and so on in tail forever," Elliot *v.* Pearsoll, 8 Watts & S. 38. A devise to A, if he should have a lawful *heir*, but if he should have none, over, creates an estate tail in A, *heir* being here construed as equivalent to *heir of his body*, Williams *v.* McCall, 12 Conn. 330; so to A for life, with remainder to his *heirs* as tenants in common, and "if he should die without issue," over, Curtis *v.* Longstreth, 44 Penna. St. 302; or "after his death to his heirs (if any he have), and if he die without heirs," over, Seely *v.* Seely, 44 Penna. St. 434; or "if he die without a legal heir," over, Braden *v.* Cannon, 1 Grant Cas. 60; or on "death without a lawful heir," over, Covert *v.* Robinson, 46 Penna. St. 274; Moody *v.* Snell, 81 Id. 359; or in fee, and "if he die without heirs," over, Shutt *v.* Rambo, 57 Penna. St. 149; so to A in trust for her heirs until they attain twenty-one, she to have the income meanwhile, Allen *v.* Henderson, 49 Penna. St. 333; so to A during his life "in trust for his heirs after his death," Kay *v.* Connor, 8 Humph. 633.

The word "heirs" is a term of limitation, not substitution, in a devise to A and B "or their heirs," McGill's Appeal, 61 Penna. St. 46; Manderson *v.* Lukens, 23 Id. 31; Buckley *v.* Reed, 15 Id. 83; King *v.* King, 1 Watts & S. 205; Patterson *v.* Hawthorn, 12 Serg. & R. 112; so, too, in a devise to S. "during his lifetime, and then to go to his heirs," Norris *v.* Hensley, 27 Cal. 439; Moore *v.* Brooks, 12 Gratt. 135; Doe *v.* Jackman, 5 Ind. 283.

A devise "to A, his *children* or grandchildren," and if he die "without children," over, was held to give A an estate tail, Wheatland *v.* Dodge, 10 Metc. 502; so a devise to A and his children, and if he "die and leave no children," over, Nightingale *v.* Burrell, 15 Pick. 104; so to A and the heirs of his body, and on his death "without lawful children," over, Monroe *v.* Douglass, 5 N. Y. 447; so to children for life, and at their death "to descend to their children," and if any "die and leave no lawful issue," over, "children" being here a word of limitation, Haldeman *v.* Haldeman, 40 Penna. St. 29. And in Merryman *v.* Merryman, 5 Munf. 440, a devise to "A and her children" was construed to give an estate tail to A. A devise to A for life, and at her death to her son B "and to his lawfully begotten children in fee simple forever," but in case he should die without children, over, B having no children at the time of testator's death, gave B an estate tail, the word "children" being here used as a term of limitation equivalent to heirs of the body, Parkman *v.* Bowdoin, 1 Sumn. C. C. 359. A devise to testator's daughter A "and her children," with the clause added, "unto them and their heirs forever," gives an estate tail to A, Graham *v.* Graham, 4 W. Va. 320. But a devise to M. "and to her children" gives an estate in common to all, and the rule in Shelley's Case does not apply to such a devise, Estate of Utz, 43 Cal. 200.

A devise in trust for A for life, then for "the children of A," and if she die without children, over, gives A only a life interest, and does not fall within the rule in Shelley's Case, Dudley *v.* Mallery, 4 Ga. 52; so "to A and the children of her body lawfully to be begotten forever, which children are to have the same equally amongst them after the decease of A," McNair *v.* Hawkins, 4 Bibb 390; or at her death "to such of her children or their heirs as shall survive her," Guthrie's Appeal, 37 Penna. St. 9; or

infant lawfully begotten or to be begotten; remainder to the testator's daughters for the term of their natural lives, equally to be divided be-

"such of her children as shall at her decease be living and shall attain 21," Taylor *v.* Gould, 10 Barb. 388; or a remainder to the first taker's children when they attain twenty-one, Williams *v.* Mears, 2 Disney (Ohio) 604; or to U. "during her life, remainder to the issue of her body by me begotten, provided, also, that such issue live to lawful age," and on failure, over, Helm *v.* Frisbie, 59 Ind. 526; or "to be held and used by the said N. during her natural life, * * * and at her death to go to the *children* of her body," Beacroft *v.* Strawn, 67 Ill. 28; or to G. "during her natural life, and to her children and assigns forever," Sorden *v.* Gatewood, 1 Ind. 107. A devise to A for life, with remainder to her "*lineal descendants*," gives only a life estate to A, McLure *v.* Young, 3 Rich. Eq. 559. So, in general, the word "children" is not equivalent to the word "heirs," and will be regarded as a word of purchase, and not of limitation, and will create a remainder, Beacroft *v.* Strawn, 67 Ill. 28; Baker *v.* Scott, 62 Id. 86.

A devise to A for life, with remainder to the *issue* of his body, creates an estate tail, the word *issue* being here used as a word of limitation, Kay *v.* Scates, 37 Penna. St. 31; or with remainder to his lawful issue, if he leave lawful issue, and if he die without issue, or they are under twenty-one, over, James' Claim, 1 Dall. 47; so to A for life, "and at his death to his legal issue or heirs," Angle *v.* Brosius, 43 Penna. St. 187; or to A, "provided he leave an issue male or female," Den *v.* Emans, Penn. (N. J.) 967; or to A for life, and "if he shall leave lawful issue," to them, *their heirs and assigns*, and in default of such issue, over, Paxson *v.* Lefferts, 3 Rawle 59. So a devise to A for life, and on his death to his issue, and on their death to their issue, creates an estate tail in A's issue, Gibson *v.* McNeeley, 11 Ohio St. 131. So a devise to A for life, and after his decease, if he shall die leaving lawful issue, "to the said lawful issue—if one, to him or her, his or her heirs and assigns forever—but if more than one, to be equally divided amongst them, their heirs and assigns forever," Powell *v.* Board of Dom. Miss., 49 Penna. St. 46. So to A for life, and on her death "to her lawful issue, their heirs, &c., equally to be divided among them, share and share alike" Kingsland *v.* Rapelye, 3 Edw. 1.

But a marriage settlement to the use of A and his wife "and their issue" gives the issue an estate by purchase, Lafitte *v.* Lawton, 25 Ga. 305; Moseby *v.* Corbin, 3 A. K. Marsh. 291.

A devise to A "*during her natural life* and the heirs of her body forever," is within the rule in Shelley's Case, Choice *v.* Marshall, 1 Kelly (Ga.) 97; Steel *v.* Cook, 1 Metc. 281; Post *v.* Post, 47 Barb. 72; so to A for life, "and after his decease to his male heirs," Fraser *v.* Chene, 2 Mich. 81; "and at his death it shall be and belong to his heirs," Steiner *v.* Kolb, 57 Penna. St. 123; so to A for life, "and *then to fall to* his heirs," McCray *v.* Lipp, 35 Ind. 116; Hampton *v.* Rather, 1 Geo. (Miss.) 193; or to A, "to be enjoyed by her during her natural life and at her death to go to the heirs of her body," Cooper *v.* Coursey, 2 Coldw. 416; McFeely *v.* Moore, 5 Ohio 465; or to the heirs of his body "for their own use," Bender *v.* Fleurie, 2 Grant Cas. 345; or "equally between them," Cooper *v.* Cooper, 6 R. I. 261; or to A for life, "and *after her death to descend* to the heirs of her body," Andrews *v.* Spurlin, 35 Ind. 262; Quillman *v.* Custer, 57 Penna. St. 125; McCray *v.* Lipp, 35 Ind. 116; Brown *v.* Lawrence, 3 Cush. 390; Brown *v.* Lyon, 6 N. Y. 419; or to her "legitimate offspring," Allen *v.* Markle, 36 Penna. St. 117; Bramble *v.* Billups, 4 Leigh 90;

tween them; remainder to G. and his heirs during the lives of the daughters; remainder to the heirs of the bodies of the said daughters,

or for life, and "after his decease to his lawful issue," and if he die without such issue, to his "heirs," Gonzales *v.* Barton, 45 Ind. 295; or for life, "and after his death for his lineal descendants," Powell *v.* Brandon, 24 Miss. 343; or "such persons as would be entitled if he died intestate," Yarnall's Appeal, 70 Penna. St. 335; or to "A and his heirs and assigns," with devise over of part if he leave but one child, Homer *v.* Shelton, 2 Metc. 194; or to A, and "to *descend* to A's youngest son and from him to the oldest male heir of said youngest son," and on failure of such issue to "the *heirs of A* forever," Dennett *v.* Dennett, 43 N. H. 499; or to "B. during his life, and in no case to be taken for debt, and at his decease to descend to his lawful heirs," Fewell *v.* Fewell, 6 Rich. Eq. 138. And a devise, prior to the statute abolishing the rule in Shelley's Case, to A for life, "and at his death to descend to the eldest male heir of his body and on failure thereof to his heirs general," is within the rule, Goodrich *v.* Lambert, 10 Conn. 449; so a devise to A, not to be sold, but "it shall be to her heirs and their assigns forever," "only the use of it to her during her natural life," Bishop *v.* Selleck, 1 Day 299.

A conveyance in trust for A, with provision that the land "shall be preserved for the benefit of the heirs of the body of A and shall vest in the heirs of her body upon her death," gives an estate tail, Carradine *v.* Carradine, 4 Geo. (Miss.) 698. A devise to A for life, and after her death to the heirs of her body, "if any such her surviving," and for want of such, over, gives an estate tail, Den *v.* Hugg, 2 South. 427: so to A for life, and "if at the time of his death he shall be possessed of a legal heir or heirs born in wedlock," to them, but if he die without such heir, over, King *v.* Beck, 12 Ohio 390.

A devise to A and B, "*to be equally divided* between them and their heirs if they have any lawful heirs at the time of their decease," falls within the rule in Shelley's Case, Crockett *v.* Robinson, 46 N. H. 454; so to A for life, "and after her death to be equally divided among her male heirs lawfully begotten," Ross *v.* Toms, 4 Dev. L. 377; but see Payne *v.* Sale, 2 Dev. & Bat. 455; Prescott *v.* Prescott, 10 B. Mon. 56. So, too, a devise to A for life, "and after his death to be divided among his heirs as the law may direct," Kennedy *v.* Kennedy, 5 Dutch. 185; but see Quick *v.* Quick, 6 C. E. Gr. (N. J.) 13. So, too, a devise to A for life, and "after his death to his lawful heirs to be equally divided," Williams *v.* Foster, 3 Hill (S. C.) 193; so a devise in remainder, "to be equally divided between my surviving children *and their heirs* forever," Threadgill *v.* Ingram, 1 Ired. L. 577. See also the next chapter, and notes, for cases of a devise to be equally divided, &c., between the heirs of the life tenant.

Superadded words of limitation are not always construed to take a devise out of the operation of the rule in Shelley's Case, *e. g.*, to A "and to the heirs of his body *and their heirs* and assigns forever," Barlow *v.* Barlow, 2 N. Y. 386; George *v.* Morgan, 16 Penna. St. 95; Hileman *v.* Bouslaugh, 13 Id. 344; Wight *v.* Thayer, 1 Gray 284; Hall *v.* Thayer, 5 Id. 523; Buxton *v.* Uxbridge, 10 Metc. 87; to A "during her life and then to descend to the heirs of her body *and to their heirs* and assigns forever," Brown *v.* Lyon, 6 N. Y. 419; or for life, with power of appointment, and in default of appointment, "to be equally divided among her right heirs, their heirs," &c., Physick's Appeal, 50 Penna. St. 128; so to A for life, then to B for life, "then to the heirs of the body of A and to their assigns, to be equally divided share and share alike," Brant *v.* Gelston, 2 Johns. Cas. 384; so to A for

equally to be divided. The question was, what estate W. took. Lord Mansfield, with Ashton and Willes, JJ., (Yates, J., *diss.*,) held that he was tenant for life only; but their judgment was reversed by a majority of the judges in the Exchequer Chamber, who held that W. took an estate tail. An appeal was brought in D. P., but was compromised.

Rule never infringed.

Since this solemn determination (*e*) the rule in question has been regarded as one of the most firmly established rules of property, and, strictly speaking, no instance can be adduced of a departure from it. Undoubtedly, in many cases a devise to a person for life, and after his death to the heirs of his body, has been held by force of the context to give an estate for life only to the

his life and that of his wife, then "to descend to their heirs jointly and their heirs and assigns or to such as may be then living," Criswell's Appeal, 41 Penna. St. 288; so to A for life, and "if he shall leave lawful issue, to them, their heirs and assigns forever," and on failure of issue, over, Paxson *v.* Lefferts, 3 Rawle 59.

A devise to A and the hiers of his body, and to their heirs and assigns forever, gives A an estate tail, Wight *v.* Thayer, 1 Gray 284; Hall *v.* Thayer, 5 Id. 523; Buxton *v.* Uxbridge, 10 Metc. 87; Den *v.* Laquear, 1 South. 301. A devise to five daughters, "to be to them an estate for life and to the heirs of their bodies after them and to their heirs and assigns of such heirs forever, * * * it being my will and intent to give an estate in fee to such of my daughters as shall die leaving issue and an estate for life only to such of them as shall die without leaving any issue to survive them," gives the daughters estates in tail, Manchester *v.* Durfee, 5 R. I. 549. A devise to A for life, and after his death to his eldest male heir, and upon the death of such male heir to his male heir and his heirs forever, gives A an estate tail, Malcolm *v.* Malcolm, 3 Cush. 472. A devise to A, "and to his male heir and to his heirs and assigns forever," with limitation over, if A die leaving no male heir, is an estate tail, Osborne *v.* Shrieve, 3 Mason C. C. 391; Carter *v.* McMichael, 10 Serg. & R. 429; so to A for life, remainder to his issue, their heirs, &c., Paxson *v.* Lefferts, 3 Rawle 59. A devise to "A, the heirs of his body and assigns forever," creates an estate tail, Pollock *v.* Speidel, 27 Ohio St. 86.

So an estate in fee is created by a devise to A "during her life, then to her heirs and their assigns," Siceloff *v.* Redman, 26 Ind. 251; or to A for life, and "after his death to his heirs and to their heirs and assigns forever," Schoonmaker *v.* Sheely, 3 Denio 485, affirming 3 Hill (N. Y.) 165. See also on this and other points in this chapter the next following chapter and notes.

(*e*) Indeed, for a long period antecedently the point had been considered as settled beyond dispute; but in the interval between the judgment in B. R. and its reversal in the Exchequer Chamber all was uncertainty. The profession beheld with no small degree of consternation a doctrine which had been regarded as an established principle of law completely subverted. An interesting statement of the circumstances and progress of this case may be found in Mr. Hargrave's Law Tracts, and more particularly in Mr. Holliday's Life of Lord Mansfield —a book which, though not in high estimation as a biographical work, the writer remembers to have perused in his early days with much pleasure.

ancestor; (*f*) but this has been the result, not of holding the heirs of the body, as such, to take by purchase, but of con*struing those words to designate *some other class of persons* generally less extensive. The rule, therefore, was excluded, not violated, by this interpretation.

Preliminary question of construction.

Whether the testator, by this or any other expression, mean to describe heirs of the body, is a totally distinct inquiry, and has therefore in the present treatise been separately discussed. (*g*) The blending of the two questions tends to involve both in unnecessary perplexity.

The rule applies to copyholds and estates *pur autre vie.*

[The principle of the rule in Shelley's Case applies to limitations of copyholds (*h*) and of estates *pur autre vie.* (*i*)

Gift to A for life, remainder to his executors.

An analogous relation subsists between a man and his personal representatives; thus Lord Coke says, (*k*) "If a man make a lease for life to one, the remainder to his executors for twenty-one years, the term for years shall vest in him, for even as ancestor and heir are *correlativa* as to inheritance, (as if an estate for life be made to A, the remainder to B in tail, the remainder to the right heirs of A, the fee vesteth in A as it had been limited to him and his heirs,) even so are testators and executors *correlativa* as to any chattel." (*l*) But this would seem to be rather a rule of construction, in order to promote the intention.]

Limitations must be created by same instrument.

To attract the rule in Shelley's Case the limitations to the ancestor, and to his heirs, must be created by the same instrument. Therefore, where (*m*) A had, on the marriage of B his son, settled lands on the son for life, remainder to the sons of that marriage successively in tail male, reversion to himself in fee, and by will devised the same to the issue of B by any other wife in tail male; it was held that this devise did not make B tenant in tail, but gave his heir of the body an estate tail by purchase.

But a will, and a schedule to it, are considered as one instrument

(*f*) See next chapter.

(*g*) As to where heirs of the body, children, sons, and issue, are used as words of limitation, see *post.*

[(*h*) Busby *v.* Greenslate, 1 Str. 445.

(*i*) Low *v.* Burron, 3 P. W. 262; Forster *v.* Forster, 2 Atk. 259.

(*k*) Co. Lit. 54 b.

(*l*) See accordingly Kirkpatrick *v.* Capel, Sugd. Pow., p. 75 (8th ed.); Holloway *v.* Clarkson, 2 Hare 521; Devall *v.* Dickins, 9 Jur. 550; Page *v.* Soper, 11 Ha. 321.]

(*m*) Moore *v.* Parker, Ld. Raym. 37, Skinn. 558.

for the purposes of this rule; (n) and the same principle undoubtedly applies to a will and codicil, or several codicils.

Will and schedule.

It was contended by Mr. Fearne (o) that where one limitation is contained in an instrument creating a power, and the other in *an appointment under such power, the rule would apply; (p) but the position has been, with much reason, questioned by other learned writers. (q)

Deeds creating and exercising powers.

The rule in Shelley's Case applies to equitable as well as legal interests; (r) but the estate of the ancestor, and the limitation to the heirs, must be of the same quality, *i. e.*, both legal or both equitable. It frequently happens that a testator devises land in trust for a person for life, and after his death in trust for the heirs of his body, but gives the trustees some office in regard to the tenant for life that causes them to retain the legal estate during his life, but which, ceasing at his death, does not prevent the limitation to the heirs of the body from being executed in them.[2] In such cases, by the rule just stated, they take as purchasers. (s) The converse case of course may, but it rarely does, occur. (t)

Legal and equitable interests.

(n) Hayes d. Foorde v. Foorde, 2 W. Bl. 698.

(o) C. R. 75. [And so Sugd. Pow. 472 (8th ed.); Hayes on Limitations 51.]

(p) Venables v. Morris, 7 T. R. 342.

(q) Butl. n. to Co. Lit. 299 b; 1 Prest. Est. 324.

[(r) Reynell v. Reynell, 10 Beav. 21; Fearne C. R. 124, *et seq.* And there are no degrees of equity, Nouaille v. Greenwood, T. & R. 26; In re White and Hindle's Contract, 7 Ch. D. 201.]

2. Baker v. Scott, 62 Ill. 86; Beacroft v. Strawn, 67 Ill. 28; Griffith v. Plummer, 32 Md. 74; Austin v. Payne, 8 Rich. Eq. 9.

Where the estate given to the life tenants is an equitable one, and that to the heirs a legal one, the rule in Shelley's Case will not apply, *e. g.*, in a devise in trust for children and if they die intestate, to their heirs, Ward v. Amory, 1 Curt. C. C. 419; or to the heirs of their bodies, Edmonson v. Dyson, 2 Ga. 307; Ward v. Saunders, 3 Sneed (Tenn.) 391; S. C., 2 Swan 174; or where the devise is in trust for a married woman for life, and upon her death to her heirs in fee tail, Ware v. Richardson, 3 Md. 505; Griffith v. Plummer, *ubi supra.* To the same effect, see Crosby v. Davis, 2 Pitts. L. J. R. 403; Thurston v. Thurston, 6 R. I. 296. So a devise for the use of testator's widow, and "at her death to be equally divided between the heirs of her body," Settle v. Settle, 10 Humph. 474. But if the trust is for a married woman during coverture, and on the death of herself and her husband "to those who would be heirs" in default of appointment, and if it is executed by the death of the husband before his wife, she will take a fee under the rule in Shelley's Case, Williams' Appeal, 83 Penna. St. 377; Eaton v. Tillinghast, 4 R. I. 276.

(s) *Ante* p. *292.

(t) An unsuccessful attempt to support such a construction was made in Nash v. Coates, 3 B. & Ad. 839, *ante* p. *319, where it is observable that the trustees had not

Legal estate clothed with a trust.

Where the limitations to the devisee for life, and to the heirs of his body, both carry the legal estate, the fact that one of them is subject to a trust does not prevent the application of the rule. Mr. Fearne, indeed, seems to have been of a contrary opinion; (u) but the affirmative has been successfully maintained by his learned editor and Mr. Preston, (x) on the well-known principle, that trust estates are not objects of the jurisdiction of courts of law.

In Douglas v. Congreve (y) real and personal estate were given to a *feme coverte* for life *for her separate use*, and after her decease to her husband for life, with remainder to the heirs of her body in tail, accompanied by a declaration that the aforesaid limitations were intended by the testator to be in strict settlement; and it was contended that as the testator had created a trust for the separate use of the devisee, she had merely an equitable interest (the husband being a trustee for her), with which the legal limitation to the heirs would not unite; but Lord Langdale con*clusively answered this reasoning by observing that the legal estate was vested in the wife, and that the power which the law gave to the husband over the real estate of his wife did not alter the nature or quality of that estate.

Rule considered in relation to *estate for life.*

The estate of freehold may be an estate for the life of the devisee himself, or of another person, or for the joint lives of several persons, and may be either absolute or determinable on a contingency, as an estate *durante viduitate*, (z) and may arise either by express devise, or by implication of law, (a) which must be, we have seen, a *necessary* implication. (b)

Freehold resulting for life.

[In what cases the freehold shall be said to result by operation of law is a preliminary question of construction. In Coape v. Arnold, (c) there was a devise to G. H., the testator's

any office to peform except to preserve the contingent remainder, and there was no such remainder unless the words "heirs of the body" were construed *children;* and the court, by rejecting this construction, destroyed the force of the argument. This case serves to show that the courts are not disposed to strain the rules of construction for the purpose of preventing the application of the rule in Shelley's Case.

(u) C. R. 35.

(x) Treat. on Estates, vol. I., p. 311.

(y) 1 Beav. 59. [See Verulam v. Bathurst, 13 Sim. 386.]

(z) Merrill v. Rumsey, 1 Keb. 888, T. Raym. 126; Fea. C. R. 31; Curtis v. Price, 12 Ves. 89; [Griffiths v. Evan, 5 Beav. 241.]

(a) Pybus v. Mitford, 1 Ventr. 372, Freem. K. B. 351, 369, T. Raym. 228; Hayes d. Foorde v. Foorde, 2 W. Bl. 698; [and see Fearne C. R. 40, *et seq.*]

(b) *Ante* ch. XVII.

[(c) 2 Sm. & Gif. 311, 4 D., M. & G. 574. See a letter (7 Jur. (N. S.) pt. II.,

eldest son, for ninety-nine years if he should so long live, and subject to the said term to trustees and their heirs during the life of G. H., upon trust only to support the contingent remainders thereinafter limited (but not expressly upon trust for G. H.,) and after the determination of the said estates unto the heirs of the body of G. H., and for want of such issue, the testator devised to his second son, and to the same trustees, and to the heirs of the body of the second son, in like manner, with remainders over. By a codicil the testator confirmed his will, and devised all his freehold and copyhold estates to four trustees, upon trust to convey to the trustees of his marriage settlement such part as with the provision in the settlement would make up £1200 jointure for his wife, and he empowered his trustees to sell, convey, and exchange or mortgage his said estates, and he charged them with payment of his debts. It was admitted that under the will standing alone the heirs of the body of the eldest son would have taken by purchase since the legal estate was devised to them; but it was contended that, as by the codicil the legal estate was vested in the trustees, the limitation to the heirs of the body of the eldest son became an equitable limitation and united with the equitable freehold which descended or resulted to the eldest son under the trust for preserving contingent remainders, and that he *thus became equitable tenant in tail. Sir J. Stuart, V. C., however, decided that the eldest son did not take an estate tail. He said, "As there is an express devise of the beneficial interest to G. H. for ninety-nine years if he should so long live, if an equitable freehold resulted to him by operation of law, the codicil having made all the devises in the will equitable estates, *either the term for ninety-nine years must be merged* in the resulting freehold, or G. H. must have had two equitable estates co-existing in him, one for the term of ninety-nine years if he so long live, the other the freehold said to result by operation of law. There are difficulties in holding, consistently with decided cases, that the freehold can result by implication to the *heir*, to whom an express estate is given for a term of years." He then cited authorities (*d*) to show that on a *conveyance* no estate could by implication of law result

Coape v. Arnold.

264) signed "W. H.," where the writer disputes the possibility of a *particular* estate resulting to the heir, (see the same author to the same effect more at large, Hayes on Limitations, p. 63,) and supports the decision on independent grounds.

(*d*) Particularly Adams *v.* Savage, and Rawley *v.* Holland, stated Fea. C. R., p. 42; Preston on Merger, pp. 212, 514; but with the result in those cases of making the whole conveyance void, and leaving the whole estate in the grantor.

to the *settlor* which would be inconsistent with or annihilate an estate expressly limited to him.

But it is submitted that, both term and life estate being equitable, there need have been no merger; (*e*) and if it had been otherwise, still as the heir takes without, and even in spite of, intent, whatever is not well given to some one else, (*f*) merger furnishes no valid argument against his title. Where was the beneficial interest during the life of G. H., if not in him? The trustees of the term were expressly excluded. (*g*)

But the V. C. relied on this further ground, that when the particular purpose of the codicil, viz., raising the jointure and debts, was satisfied, the trustees of the codicil would be bound to re-convey according to the limitations of the will, and *in its very language*. And on this latter ground exclusively the decision was affirmed. Lord Cranworth's judgment contains some observations which, taken alone, might seem to favor the doctrine that the rule would not apply if it could be collected that the testator did not intend that it should operate; which would in effect make it a rule of construction. But he added, "The short ground of my decision is that the only effect of the codicil was to transfer the legal estate to the trustees, upon trust, after making due *provision for the jointure and debts, to put the estate in precisely the same course of enjoyment as that in which it would have gone if no codicil had been made; and this certainly did not give G. H. an estate which enabled him to defeat the remainder, limited to the heirs of his body. I must not be understood as at all impunging the doctrine that the rule in Shelley's Case does not depend upon, and cannot be controlled by, the intention of the testator; if the estates created are such as to bring the rule into operation, the rule will prevail even against a declared intention to the contrary. But where the question is, what estates, upon the true construction of the will, were meant to be created,—did the testator mean to create an estate of freehold, or only an estate for years?—there intention may and must be regarded; and here, looking to the intention of the testator, I cannot doubt that he meant to give to the first taker an estate for years only, with the ex-

Lord Cranworth's judgment in Coape v. Arnold.

(*e*) Prest. Merg. 557.

(*f*) *Ante* ch. XVIII.

(*g*) The V. C.'s opinion would seem to have been that they had the equitable estate during the life of G. H. (2 Sm. & G. 325); but it is difficult to concede this against the express declaration of trust. It follows (as there are no degrees of equity) that they took no estate whatever.

press object of avoiding the operation of the rule. In such a case it is, I think, the duty of the court to give effect to the intention."

It would seem, therefore, that the L. C. treated the trust as executory. (*k*) He is reported, indeed, to have disclaimed this ground; but if the conveyance, when made by the trustees, would have altered the *sense* of the words as they stood in will and codicil, it matters little whether this was by adhering to the letter or by changing it. On no other ground could the court have avoided deciding what became of the beneficial interest during the life of G. H.]

Expressions negativing a larger estate than for life.

It is to be observed, too, that words, however positive and unequivocal, expressly negativing the continuance of the ancestor's estate beyond the period of its primary express limitation, will not exclude the rule; (*l*) for this intention is as clearly indicated by the mere limitation of a life estate, as it can be by any additional expressions; and the doctrine, let it be remembered, is a rule of tenure, which is not only independent of, but generally operates to subvert, the intention.[3]

(*k*) As to which see below, section 2.]

(*l*) Robinson *v.* Robinson, 1 Burr. 38, 2 Ves. 225, 3 B. P. C. Toml. 180 *nom.* Robinson *v.* Hicks, stated *infra;* Perrin *v.* Blake, 4 Burr. 2579, *ante* p. *333; Hayes d. Foorde *v.* Foorde, 2 W. Bl. 698; Thong *v.* Bedford, 1 B. C. C. 313; [Roe d. Thong *v.* Bedford, 4 M. & Sel. 362.]

3. As to the question of intention in connection with this rule, see the remarks of Strong, J., in Guthrie's Appeal, 37 Penna. St. 9, 13, where he says: "It is therefore always a precedent question, in any case to which it is supposed the rule is applicable, whether the limitation of the remainder is made to the heirs in fee or in tail, as such, and in solving this question, the rule itself renders no assistance. It is silent until the intention of the grantor or devisor is ascertained. But if that intention is found to be that the remainder-men are to take as heirs of the grantee or devisee of the particular freehold, instead of becoming themselves the root of a new succession, the rule is applied, though it may defeat a manifest intention that the first taker should have but an estate for life. It is very carefully to be noted, that in searching for the intention of the donor or testator, the inquiry is not whether the remainder-men are the persons who would have been heirs, had the fee been limited directly to the ancestor. The thing to be sought for is not the persons who are directed to take the remainder, but the character in which the donor intended they should take. In the very many cases in which the question has arisen, whether the rule was applicable, the difficulty has been in determining whether the intention was that the remainder-men should take as heirs of the first taker, or originally as the stock of a new inheritance; the effort in almost all of them has been to show that the words 'heirs' or 'heirs of the body' were not used in their technical sense, as expressive of the nature and extent of the devise, and its descent, but as *descriptio personarum*, designatory of individuals. To those words the law attaches a definite meaning. They are words of limitation, and not of purchase. When used by a testator, the law presumes that he used

Interposition of trustees to preserve contingent remainders, &c.

Upon the same principle, neither the interposition of a trust estate to preserve contingent remainders, between the estate for life and the limitation to the heirs of the body, (*m*) nor a decla*ration that the first taker shall have a power of jointuring, (*n*) or that his estate shall be without impeachment of waste, (*o*) or, if a woman, for her separate use, (*p*) or that the devisee shall have no power to defeat the testator's intent, will prevent the remainder to the heirs attaching in the ancestor. (*q*)

Rule in regard to limitation to the heirs.

With respect to the limitation to the heirs of the body, it is (as before suggested) immaterial whether they are described under that *or any other denomination*, since it is clear that in every case in which the word "issue" or "son" is construed to be a word of limitation, and follows a devise to the parent for life or for any other estate of freehold, such parent becomes tenant in tail by force of the rule in Shelley's Case. (*r*)

Immaterial under what denomination heirs are described.

The words in question are read as synonymous with *heirs of the body*, and consequently, the effect is the same as if those words had been actually used. Upon the same

them in their legal sense, that he intended not individuals, but quantity of estate, and descent. Whenever they are employed, therefore, the burden is thrown upon him who contends that they are words of purchase, to rebut this presumption, and to show that they are used in the particular grant or devise to designate persons. Undoubtedly the word 'heirs' may be shown by their context, to have been used in the sense of sons, daughters, children, &c.; and when it is so used the rule in Shelley's Case is inapplicable: Fearne on Remainders 188, 189; Smith on Executory Interests 479. But the cases abundantly show that the intent not to use the words in their legal sense must be unequivocal, 'that it must appear so plainly (to use the language of Lord Alvanly) that no one can misunderstand it.'"

(*m*) Coulson *v.* Coulson, 2 Stra. 1125; Hodgson *v.* Ambrose, Doug. 337, 3 B. P. C. Toml. 416; Sayer *v.* Masterman, Amb. 344; Measure *v.* Gee, 5 B. & Ald. 910.

(*n*) King *v.* Melling, 2 Lev. 58, 1 Ventr. 225, 3 Keb. 42.

(*o*) Papillon *v.* Voice, 2 P. W. 471; Denn d. Webb *v.* Puckey, 5 T. R. 299; Frank *v.* Stovin, 3 East 548; Jones *v.* Morgan, 1 B. C. C. 206; Bennett *v.* Earl of Tankerville, 19 Ves. 170.

(*p*) Lady Jones *v.* Lord Say and Sele, 8 Vin. Ab. 262, pl. 19, 3 B. P. C. Toml. 113; though in this case it was held that the estate for life was equitable, and the gift to the heirs carried the legal estate. See also Roberts *v.* Dixwell, 1 Atk. 607.

(*q*) Roe d. Thong *v.* Bedford, 4 M. & Sel. 362, 1 B. C. C. 313.

[(*r*) Robinson *v.* Robinson, 1 Burr. 38, 2 Ves. 225; Mellish *v.* Mellish, 3 B. & Cr. 533, 3 D. & Ry. 804; Griffiths *v.* Evan, 5 Beav. 241; Harvey *v.* Towell, 7 Hare 231, see S. C., 12 Jur. 242; Tate *v.* Clarke, 1 Beav. 100; Doe *v.* Rucastle, 8 C. B. 876; Lewis *v.* Puxley, 16 M. & Wels. 733; and see ch. XXXVIII.

principle, in the converse case, *i. e.*, where the words *heirs of the body* are explained to mean some other class of persons, the rule does not apply. (*s*) [4]

It is clear, too, that the limitation to the heirs of the body may

(*s*) See *post* ch. XXXVII., § 3, and Brookman *v.* Smith, L. R., 7 Ex. 305, where a limitation to "the heirs and assigns of A as if she had not been married" (which excluded her lineal descendants) was held not within the rule. See also Allgood *v.* Blake, Id. 363.]

4. Johnson *v.* Johnson, 2 Metc. (Ky.) 331; Paddison *v.* Oldham, 1 Harr. & McH. 336; McKenzie *v.* Jones, 10 Geo. (Miss.) 230; Davis *v.* Hayden, 9 Mass. 514; Armstrong *v.* Zane, 12 Ohio 287; Hamilton *v.* Wentworth, 58 Me. 101; Brownell *v.* Brownell, 10 R. I. 509; Dott *v.* Cunningham, 1 Bay (S. C.) 453; Brislain *v.* Wilson, 63 Ill. 173; Brooks *v.* Evetts, 33 Tex. 742; Polk *v.* Faris, 9 Yerg. 209; Roach *v.* Martin, 1 Harring. 548; Den *v.* Laquear, 1 South. 301; Den *v.* Baldwin, 1 Zab. 395, 400; Steel *v.* Cook, 1 Metc. 281; Giddings *v.* Smith, 15 Vt. 344; Auman *v.* Auman, 21 Penna. St. 343; Watts *v.* Clardy, 2 Fla. 369; Swain *v.* Rascoe, 3 Ired. L. 200; Wells *v.* Olcott, Kirby (Conn.) 118; Brown *v.* Alden, 14 B. Mon. 143; Fulton *v.* Harman, 44 Md. 251; Stires *v.* Van Rensselaer, 2 Bradf. 172; Warners *v.* Mason, 5 Munf. 242.

The word "heirs" is a word of limitation—when, McGill's Appeal, 61 Penna. St. 46; King *v.* King, 1 Watts & S. 205; Patterson *v.* Hawthorn, 12 Serg. & R. 112; Buckley *v.* Reed, 15 Penna. St. 83; Manderson *v.* Lukens, 23 Id. 31; Norris *v.* Hensley, 27 Cal. 439; Moore *v.* Brooks, 12 Gratt. 135; Doe *v.* Jackman, 5 Ind. 283; Matter of Sanders, 4 Paige 293, 296; Thurber *v.* Chambers, 66 N. Y. 42. Word "issue"—when, Kay *v.* Scates, 37 Penna. St. 31; Paxson *v.* Lefferts, 3 Rawle 59; Angle *v.* Brosius, 43 Penna. St. 187; Den *v.* Emans, Penn. (N. J.) 967; James' Claim, 1 Dall. 47; Gibson *v.* McNeely, 11 Ohio St. 131; Powell *v.* Board of Dom. Miss., 49 Penna. St. 46; Kingsland *v.* Rappelye, 3 Edw. 1; Kleppner *v.* Laverty, 70 Penna. St. 70; Chelton *v.* Henderson, 9 Gill 432. Word "children"—when, Haldeman *v.* Haldeman, 40 Penna. St. 29; Parkman *v.* Bowdoin, 1 Sumn. C. C. 359; Jones *v.* Jones, 2 Beas. 236; Estate of Utz, 43 Cal. 200; Carr *v.* Estill, 16 B. Mon. 309.

Word "children" is a word of purchase—when, Baker *v.* Scott, 62 Ill. 86; Beacroft *v.* Strawn, 67 Id. 28; Matter of Sanders, 4 Paige 293; Rogers *v.* Rogers, 3 Wend. 503; Chrystie *v.* Phyfe, 19 N. Y. 344; Murphy *v.* Harvey, 4 Edw. 132; Moon *v.* Stone, 19 Gratt. 130; Reeder *v.* Spearman, 6 Rich. Eq. 88; Guthrie's Appeal, 37 Penna. St. 9, 15; Merrymans *v.* Merryman, 5 Munf. 440; Turner *v.* Patterson, 5 Dana 292; Vanzant *v.* Morris, 25 Ala. 285; Fairchild *v.* Crane, 2 Beas. 105. Word "heirs"—when, Valentine *v.* Borden, 100 Mass. 273; Williamson *v.* Williamson, 18 B. Mon. 329; Woodruff *v.* Woodruff, 32 Ga. 358; Templeton *v.* Walker, 3 Rich. Eq. 543; Davis *v.* Taul, 6 Dana 52; Cleveland *v.* Spilman, 25 Ind. 95; Jarvis *v.* Quigley, 10 B. Mon. 104; Adie *v.* Cornwell, 3 Mon. 296; Wheeler *v.* Allen, 54 Me. 232; Hamilton *v.* Wentworth, 58 Id. 101; Darden *v.* Burns, 6 Ala. 362; Graves *v.* Williams, 17 Id. 62; Powell *v.* Glenn, 21 Id. 458, 467. Word "issue"—when, Tongue *v.* Nutwell, 13 Md. 415; Williams *v.* Caston, 1 Strobh. 130; Buist *v.* Dawes, 4 Rich. Eq. 421; Moore *v.* Paul, 7 Id. 358; Powell *v.* Board Dom. Miss., 49 Penna. St. 46; Henry *v.* Means, 2 Hill (S. C.) 328; McPherson *v.* Snowden, 19 Md. 197; Taylor *v.* Taylor, 63 Penna. St. 484; Weehawken Ferry Co. *v.* Sisson, 2 C. E. Gr. (N. J.) 475.

Limitation to the heirs by implication.

arise by implication; as (if the will is subject to the old law) in the case of a devise to A for life, and in case he shall die without heirs of his body, or without issue, then to B. Such a case (in which the first taker, beyond all doubt, has an estate tail) (*t*) is an exemplification of the rule in Shelley's Case. A gift to the issue or to the heirs of the body is implied; and the effect is that the devise is read as a gift to A for life, and after his death to his issue or heirs of the body, (*u*) which brings it to the common case illustrative of the rule. These positions are indisputable, but the first and third appear to be frequently lost sight of.

As to declaration that heirs shall take by purchase.

*As no declaration, the most positive and unequivocal, that the ancestor shall take only, or his estate be subject to the incidents of, a life estate, will exclude the rule, so a declaration that the heirs shall take as purchasers is equally inoperative to have such effect. (*x*)[5]

Effect of contingent limitation to the heirs.

The rule in Shelley's Case applies where the limitation to the heirs of the body is *contingent*. Thus, under a devise to A and B for their joint lives, with remainder to the heirs of the body of him who shall die first, the heir takes by descent. (*y*)

Such limitation contingent, when.

It seems, however, that the mere possibility of the estate of freehold determining before the ancestor has heirs of his body (*i. e.*, before his decease, since *nemo est hæres viventis*) does not render the limitation contingent. Thus, where (*z*) lands were limited to A *during widowhood*, and, after her death, *to the heirs of her body* (in which case it is evident that, by the marriage of A, her estate would be determined before she could have any heirs of her body), Sir W. Grant, M. R., held that an absolute estate tail was executed in her; and this accords with the resolution of the judges in the early case of Merrill *v.* Rumsey. (*a*)

The difference between these and the former cases is, that there the

(*t*) See *ante* vol. I., p. *554.

(*u*) See Lord Hardwicke's judgment in Lethieullier *v.* Tracy, as reported 1 Ken. 56.

(*x*) See Harg. Law Tracts 562.

5. It is not the design of the rule to give meaning to words, but to fix the nature and quantity of an estate. Therefore, whenever it becomes certain that the term "heirs" is used with an intent that they should take as purchasers, the instrument should be so construed, Doe *v.* Jackman, 5 Ind. 283.

(*y*) [Co. Lit. 378 b, and] see 1 Prest. Est. 316.

(*z*) Curtis *v.* Price, 12 Ves. 99.

(*a*) T. Ray. 126, 1 Keb. 888. But see 1 Sid. 247.

limitation is contingent in the very terms of its creation, and the rule, therefore, does not alter it in this respect; but in the latter cases, the limitation is merely contingent by the application of a principle of law governing remainders; and when the rule under consideration operates to prevent its taking effect as a remainder, it destroys its contingent quality. The same principle is applicable in the case of a devise to A for the life of B, remainder to the heirs of his body; for as the limitations operate by force of this rule to give an executed estate tail, that estate is not affected by the circumstance of B, the *cestui que vie*, dying in the lifetime of A, and, consequently, before he has any heir of his body. (*b*)

Possibility of freehold determining in lifetime of ancestor.

It is essential to the operation of the rule in Shelley's Case, that the heirs of the body should proceed from the person taking the estate of freehold, and from that person only; for, if the devise be to A for life, and after his decease, to the heirs of the body of A *and of another person*, who might have a *common heir of their bodies, it is a contingent remainder in tail to the heirs.

Limitation to heirs of tenant of freehold *and of another person.*

Thus in Gossage *v.* Taylor, (*c*) where the limitations were to the wife for life, remainder to the heirs to be begotten on the body of the wife by the husband, the heirs were held to take by purchase. And the same construction prevailed in Frogmorton d. Robinson *v.* Wharrey, (*d*) where S. surrendered copyholds to the use of M., his then intended wife, and the heirs of their two bodies lawfully to be begotten; [although the limitation to the heirs was not expressed to be by way of remainder, and the estate of the wife was not limited expressly to a life estate.]

To wife for life, remainder to heirs of the bodies of husband and wife.

To wife and heirs of body of husband and wife.

It may be observed, that, under such limitations, if the person taking the estate for life die in the lifetime of the other, the contingent remainder to the heirs fails; (*e*) for, as there could be no heir of their bodies until the death of both (*nemo est hæres viventis,*) the failure of the particular estate before that period defeats the remainder. (*f*)

(*b*) See Perkins, § 337; Merrill *v.* Rumsey, 1 Keb. 888, T. Ray. 126, Fea. C. R. 31.

(*c*) Sty. 325, cited again *post* p. *343.

(*d*) 3 Wils. 125, 144, 2 W. Bl. 728. See also Lane *v.* Pannell, 1 Roll. Rep. 238, 317, 438.

(*e*) Lane *v.* Pannell, 1 Roll. Rep. 238, 317, 438; Anon., Dy. 99 b.

(*f*) See this rule adverted to, *ante* ch. XXVI.; [and remember stat. 40 and 41 Vict., c. 33, by virtue of which contingent remainders will in future be capable of taking effect in such cases as executory devises.]

But if, in such a case, the tenant for life and the other person to whose heirs the limitation is made are of the same sex, or being of different sexes, are not actually married, and are so related by consanguinity or affinity, that they cannot have, or be presumed to have, common heirs of their bodies, the effect is obviously different; for, as the testator cannot mean heirs issuing from them both, the limitation is to be read as a limitation to the heirs of the body of A, the tenant for life, and to the heirs of the body of the other person respectively. The consequence is, that the former becomes, by force of the rule, tenant in tail of one undivided moiety, and the heir of the latter takes the other moiety by purchase.

Distinction where there could not be joint heirs of the bodies.

Pari ratione, if A and B were tenants in common for life, with remainder, as to the entirety, to the heirs of the body of A, A would be tenant in tail of one undivided moiety, and there would be a contingent remainder in tail to the heirs of his body in the other moiety.

Where ancestor is tenant in common of freehold.

Where the freehold is limited to husband and wife concurrently (and the same principle seems to apply in regard to persons capable, *de jure*, of becoming such), with remainder to the heirs of their bodies, the heirs, by the operation of the rule in question, *take by descent. (*g*) And the effect, it should seem, would be the same, if *successive* estates for life were limited to the husband and wife, or to persons capable of becoming such, with remainder to the heirs of their bodies. (*h*)

Here it may be observed, that where there is a limitation to two persons jointly, with remainder to the heirs of the body of *one* of them, the disentailing assurance (now substituted for a common recovery) of the latter will acquire the fee simple in a moiety. (*i*) [Where these persons are husband and wife they are tenants by entireties; but the husband alone, without the concurrence of his wife, could formerly have conveyed the whole freehold and made a good tenant to the *præcipe*, and therefore could have barred the entail where the remainder was limited to the heirs of his body only. If the remainder was limited to the heirs of the body of both, both must have

Limitation to heirs of one joint tenant of freehold;

—where husband and wife are tenants by entireties.

(*g*) See Roe d. Aistrop *v.* Aistrop, 2 W. Bl. 1228.

(*h*) Stephens *v.* Britridge, 1 Lev. 36, T. Ray. 36. [And see 1 Preston Est. 336.]

(*i*) Marquis of Winchester's Case, 3 Rep. 1.

been vouched. (*k*) But now by 3 and 4 Wm. IV., c. 74, (*l*) where the husband is seized in right of his wife, the husband and wife together are the protectors of the settlement. The case where husband and wife are tenants by entireties does not seem expressly provided for, though perhaps by a liberal interpretation it might be considered as included under sections 23 and 24 taken together.] (*m*)

Questions of this kind have most frequently occurred under limitations in marriage-settlements, but they may of course arise under wills. In deciding on the application of the rule to such cases, the first object should be to see out of whose body the heirs are to issue; and if it be found that they are to proceed from any person who takes an estate of freehold, and him or her only, such person becomes tenant in tail. If from a person who takes an estate of freehold jointly with another, it seems the former will take an estate tail *sub modo* only. (*n*) If from a person who takes an undivided estate in common, he will then, we have seen, take an estate tail to the extent of that *undivided interest; but if the heirs of the body are to proceed from two persons as husband and wife, and *one* of them only takes an estate for life, the heirs will be purchasers.

Further observations on limitations of this nature.

If the limitation is to husband and wife and the heirs to be begotten *on* the body of the wife by the husband, this will be an estate tail in both; (*o*) for, as the heirs are not in terms required to be of the body of either in particular, the construction is the same as if they were to issue from *both;* and, accordingly, we have seen that where such a limitation occurred after an estate for life to the wife only, it was held, that she did not take an estate tail. (*p*)

Distinction between heirs *of* the body and heirs *on* the body to be begotten.

On the other hand, if the devise be to the wife for life, and then to the heirs *of* her body to be begotten by the husband, she takes an

[(*k*) Cuppledike's Case, 3 Rep. 6; Fitzwilliam's Case, 6 Rep. 32; 1 Prest. Conv. 55; but though the husband could make a good tenant to the *præcipe*, a recovery had against himself as tenant to the *præcipe* was bad, on the ground that the benefit of the recompense would not then enure to the proper parties; and it could not be good for a moiety, for the remainder depends on a joint and indivisible estate, which the husband could not sever, Owen's Case, or Owen *v.* Morgan, And. 162, Moore 210, 3 Rep. 5 a. See also Green d. Crew *v.* King, 2 W. Bl. 1211; Doe d. Freestone *v.* Parratt, 5 T. R. 654; Clithero *v.* Franklin, 2 Salk. 568; 1 Prest. Conv. 58, 124.

(*l*) Section 24.

(*m*) See 1 Phil. 261.]

(*n*) See Fea. C. R. 36.

[(*o*) Stephens *v.* Britridge, 1 Lev. 36, T. Ray. 36]; Denn d. Trickett *v.* Gillot, 2 T. R. 431.

(*p*) Gossage *v.* Taylor, Sty. 325.

estate tail special, by force of the rule under consideration. (q) The distinction, it will be perceived, is between heirs *on* the body and heirs *of* the body.

So if the limitation were to the husband for life, remainder to the heirs of the body of the husband on the wife to be begotten, he would, by the application of the same principle, have an estate tail special. (r) But if, in the former case, the estate for life had been limited to the *husband*, and, in the latter, to the *wife*, the heirs of the body would have taken by purchase.

Tenant in tail after possibility of issue extinct.

Under limitations in special tail, if the tenant in tail survive the other person from whom the heirs are to spring, and there be no issue, such surviving tenant in tail becomes, as is well known, tenant in tail after possibility of issue extinct. In Platt *v.* Powles (s) it was decided that such was the situation of the testator's widow, to whom lands were devised *for life, and after her decease to the heirs of her body by him,* at the expiration of the period during which she might have had issue by the testator, namely, nine or ten months after his death. During that time, issue being, in contemplation of law, possible, (irrespective of age,) and the devisee, therefore, being tenant in tail, she might have acquired the fee by means of a common recovery.

Rule considered in gard to executory trusts.

II.—It has been already observed, that the rule in Shelley's Case applies as well to equitable limitations as to legal estates. *Mr. Fearne has labored to establish this conclusion, in opposition to the case of Bagshaw *v.* Spencer, (t) which was decided by Lord Hardwicke on the ground of the difference of construction applicable to legal and equitable interests; a doctrine which has been overruled in a long series of cases, (u) including a subsequent decision of this eminent judge himself. (x)

The preceding remarks, it should be observed, apply only to *executed* trusts;[6] for between trusts *executed* and *executory* there is a very material difference, which requires particular examination.

(q) Alpass *v.* Watkins, 8 T. R. 516.

[(r) Roe d. Aistrop *v.* Aistrop, 2 W. Bl. 1228.]

(s) 2 M. & Sel. 65.

(t) 1 Ves. 142, 2 Atk. 246, 570, 577; see Fea. C. R. 124, *et seq.*

(u) Bale *v.* Colman, 2 Vern. 670, 1 P. W. 142; [Papillon *v.* Voice, 2 P. W. 471, 477;] Wright *v.* Pearson, 1 Ed. 119; Austen *v.* Taylor, Id. 361, Amb. 376; Jones *v.* Morgan, 1 B. C. C. 206. See also Jervoise *v.* Duke of Northumberland, 1 J. & W. 559, *inf.;* [Reynell *v.* Reynell, 10 Beav. 21.]

(x) Garth *v.* Baldwin, 2 Ves. 646

6. A devise directing devisee to convey

A trust is said to be executory or directory where the objects take, not immediately under it, but by means of some further act to be done by a third person, usually him in whom the legal estate is vested. As where a testator (*y*) devises real estate to trustees in trust *to convey* it to certain uses, or directs money to be laid out in land *to be settled* to certain uses [which are indicated in improper or informal terms.] (*z*) In these cases, the direction to convey or settle is considered merely in the nature of instructions, or heads of a settlement, which are to be executed, not by a literal adherence to the terms of the will, which would render the direction to settle nugatory, but by formal limitations adapted to give effect to the purposes which the author of the trusts appears to have had in view. (*a*)

Executory trust, what.

Thus, where a testator devises lands to trustees with a direction to settle them, or bequeaths a money fund to be laid out in the purchase of lands to be settled to the use of A for life; *remainder to trustees during his life to preserve contingent remainders;* remainder to the heirs of the body of A (limitations under which, if literally followed, A would be tenant in tail, by force of the rule in Shelley's Case), courts of equity, presuming that the testator could not have so absurd an intention as that a conveyance should be made vesting in the first taker an estate which would enable him immediately to acquire the fee simple by means of a disentailing assurance, execute the trust by directing a strict settlement, *i. e.*, limitations to the use of A for life; remainder to trustees to preserve contingent *remainders, remainder to his first and other sons successively in tail. (*b*)

Uses in strict settlement, when directed.

to "A for life with remainder to the right heirs of A, their heirs and assigns forever," takes effect as an executory trust, and is therefore not within the rule in Shelley's Case, Wood *v.* Burnham, 6 Paige 513; Tallman *v.* Wood, 26 Wend. 9. A devise in trust to keep invested and pay the income to "A and his heirs" is not within the rule in Shelley's Case, Burtis *v.* Doughty, 3 Bradf. 287. Executory trusts are exempted from the operation of the rule in Shelley's Case, Porter *v.* Doly, 2 Rich. Eq. 49; Locke *v.* Barbour, 62 Ind. 577; Baker *v.* Scott, 62 Ill. 86, 102; Josetti *v.* McGregor, 49 Md. 202.

(*y*) See Hayes' Inquiry, 248, 249 and 270.

(*z*) Earl Stamford *v.* Hobart, 3 B. P. C. Toml. 33.

(*a*) Cited with approval by Lord Cairns, L. R., 4 H. L. 572.

(*b*) Papillon *v.* Voice, 2 P. W. 471. See also Leonard *v.* Earl of Sussex, 2 Vern. 526; Earl Stamford *v.* Hobart, 3 B. P. C. Toml. 31; Lord Glenorchy *v.* Bosville, Cas. temp. Talb. 3; Ashton *v.* Ashton, 1 Coll. Jur. 402; White *v.* Carter, 2 Ed. 366, Amb. 670; Horne *v.* Barton, Coop. 257.

So, in Leonard *v.* Earl of Sussex, (*c*) where lands were devised to trustees and their heirs for payment of debts and legacies, with a direction afterwards to *settle* what should remain unsold, one moiety to the testatrix's son H. and the heirs of his body by a second wife, with remainder over; and the other moiety to the testatrix's son F. and the heirs of his body, with remainders over; taking special care in *such settlement* that it should *never be in the power* of either of the sons to *dock the entail of either of their moieties:* (*d*) it was held, that, in executing the settlement, the sons must be made only tenants for life, and should not have estates tail *conveyed* to them, but their estates for life should be without impeachment of waste: (*e*) because here the estate was *not executed*, but only *executory*, and therefore the intent and meaning of the testatrix was to be pursued: she had declared her mind to be, that her sons should not have it in their power to bar their children, which they would have if an estate tail were to be conveyed to them. And the court took it to be as strong in the case of an *executory* (trust in a) devise, for the benefit of the issue, as if the like provision had been contained in marriage articles; but had the testatrix by her will devised to her sons an estate tail, the law must have taken place; and they might have barred their issue, notwithstanding any subsequent clause or declaration in the will that they should not have power to dock the entail. (*f*)

Settlement to be made on A and the heirs of his body.

Direction that it should not be in his power to dock the entail.

So, in Lord Glenorchy *v.* Bosville, (*g*) where the devise was to trustees and their heirs, in trust, till the marriage or death of A, to receive the rents and pay her an annuity for her maintenance, and as to the residue, to pay testator's debts and legacies, and after payment thereof in trust for A; and if she married a Protestant, after her age, or with consent, &c., then *to convey* the estate after such marriage to the use of her *for life*, without impeachment of waste, remainder to her husband for life, *remainder to the *issue of her body*, with remainders over: Lord

To convey to A for life, without impeachment, &c., remainder to issue of her body.

(*c*) 2 Vern. 526.

(*d*) See [also Thompson *v.* Fisher, L. R., 10 Eq., 207. But] see observation *infra*.

[(*e*) For the rights of the first taker are to be cut down only so far as necessary to prevent alienation by him; but where the executory trust in terms gives the first taker a life estate, he is not made dispunishable for waste, Davenport *v.* Davenport, 1 H. & M. 775; Stanley *v.* Coulthurst, L. R., 10 Eq. 259.]

(*f*) As to this, see *ante* p. *19.

(*g*) Cas. temp. Talb. 3. See also Ashton *v.* Ashton, 1 Coll. Jur. 402, 525.

Talbot held, that though A would have taken an *estate tail*, had it been the case of an *immediate devise*, yet that the trust, being *executory*, was to be *executed in a more careful and more accurate manner*; and that a conveyance to A for life, remainder to the husband for life, with remainder to their first and every other son, with remainder to the daughters, would best serve the testator's intent.

To be purchased and settled to A and his issue in tail male.

Again, in White *v.* Carter, (*h*) where a testator gave his personal estate to trustees to purchase land, to be settled and assured as counsel should advise unto and upon the trustees and their heirs, upon trust and to and for the use *of A and his issue in tail male, to take in succession and priority of birth*; and there was a direction to the trustees to pay the dividends of the moneys until the purchase to A *and his sons* and issue male, Lord Northington decreed a strict settlement. [This decree was affirmed by Lord Camden upon a rehearing, (*i*) who observed that the latter clause put it out of doubt; the testator had there explained his meaning by making use of the words, "sons and issue."

To be conveyed to A for her separate use for life, and after her decease to the heirs of her body.

And in Roberts *v.* Dixwell, (*k*) where a testator directed his trustees to convey lands in trust for the separate use of his daughter for her life, and so as her husband should not intermeddle therewith, and, after her decease, in trust for the heirs of her body, Lord Hardwicke held this to be an executory trust; and therefore, to prevent the husband becoming tenant by the curtesy (which he could not be consistently with the testator's intention that he should have no manner of benefit from the estate), he decreed that the daughter should be made tenant for life only and not tenant in tail.

To be settled upon A and his issue.

Again, in Parker *v.* Bolton, (*l*) where the testator devised lands to A and directed him to settle them upon himself and his issue male by his lawful wife, and for want of such issue upon B and his lawful issue, it was held by Pepys, M. R. that A was tenant for life only.

(*h*) 2 Ed. 366.

[(*i*) Amb. 670.

(*k*) 1 Atk. 607, cited 2 Ves. 652, *nom.* Sands *v.* Dixwell.

(*l*) 5 L. J., (N. S.) Ch. 98. Compare Seale *v.* Seale, stated *post*. In Sweetapple *v.* Bindon, 2 Vern. 536, it does not appear to have been argued that the daughter ought to have taken only a life estate under the settlement. To be settled for the sole use of A and her issue.—The two cases last stated in the text seem opposed to the subsequent decision of Samuel *v.* Samuel, 14 L. J., Ch. 222, 9 Jur. 222, where a testator directed that personalty should be settled on A for the *sole* use of A and her lawful issue, and Sir L. Shadwell held that A was absolutely en-

*And in Shelton *v.* Watson, (*m*) the testator directed an estate "to be purchased and made *hereditary and settled upon* my here constituted heir, and *to descend to his heirs*, or dying without issue as I shall now provide, and I hereby constitute W. S. my heir and successor, and the said estate when purchased to be settled on him, his heirs and *successors in the direct male* line lawfully begotten. In case W. S. die without issue," a similar settlement was directed with respect to the two brothers of W. S. successively, the testator expressing his intent *that the estate should never pass out of his name and family.* Sir L. Shadwell, V. C., held that W. S. and his brothers were to be made tenants for life only.]

To be purchased and settled on A, his heirs and successors in the direct male line.

But a distinction has been sometimes taken between the effect of a clause directing the trustees to purchase land *and settle it*, as in Papillon *v.* Voice and White *v.* Carter, and a direction to them simply to purchase, the testator himself declaring the uses of the land so to be purchased. Thus, in Austen *v.* Taylor, (*n*) where the testator devised lands to A for life without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of A; and bequeathed personal estate to be laid out in land, *which should remain continue and be* to the same uses as the land before devised; Lord Northington, after observing in reference to Papillon *v.* Voice and Leonard *v.* Earl of Sussex, that there the trustees were directed *to settle, and that an estate tail would have been no settlement*, held that the case before him was distinguishable, inasmuch as the testator had referred to no settlement by the trustees, but had declared his own uses and trusts; which being declared, he knew no instance where the court had proceeded so far as to alter or change them; accordingly, A was to be tenant in tail in the lands to be purchased.

Alleged distinction where testator himself declares uses of lands to be purchased.

This case is stated by Mr. Ambler to have been dissatisfactory to the profession, which is denied by Lord Henley; (*o*) but Lord Eldon has spoken of the decision in terms which imply doubt of its soundness. (*p*) He also observed that the judges who decided Papillon *v.* Voice and Austen *v.* Taylor agreed in the

Disapproval by Lord Eldon.

titled. It is evident that if the subject of gift had been real estate, he would have held A to be tenant in tail.

(*m*) 16 Sim. 542.]

(*n*) 1 Ed. 361, Amb. 376.

(*o*) See note, 1 Ed. 369.

(*p*) See Green *v.* Stephens, 17 Ves. 76; Jervoise *v.* Duke of Northumberland, 1 J. & W. 574.

principle, but differed in the application of it. The distinction upon which the latter case is founded (or at least is usually supposed to be founded), certainly has not been invariably *adopted; for in Meure *v.* Meure, (*q*) where lands were devised to trustees in trust to sell, who with the money arising from the sale were to purchase other freehold lands, or some stock in the public funds, and then to permit A and his assigns to receive the interest and profits for his life, and after his decease to permit the plaintiff and his assigns to receive the interest and profits of the said money as aforesaid, or the rents and profits of the said land if unsold, or such other lands as should be purchased, *during his natural life*, and after his decease, then in trust *for the use of the issue of the body of the plaintiff lawfully begotten*, and in default of such issue over; Sir J. Jekyll, M. R., held that, in executing the trust, lands should be purchased *and the plaintiff made tenant for life only.*

Disregarded in certain cases.

Devise of lands to be purchased to A for life, remainder to his issue.

Here the lands to be purchased were devised immediately to these limitations, without any express direction to settle; and the terms used would, if applied to lands directly devised, clearly have made A tenant in tail, (*r*) and yet he was held to be tenant for life only.

So, in Harrison *v.* Naylor, (*s*) where the testator directed his executors to purchase a freehold estate, and *gave and devised* such estate, when purchased, to A, to him and the heirs male of his body forever; and if A should die without issue male, then *he gave and devised* the said estate to the heir male of his (testator's) daughter E., but if E. had no issue, then he gave and devised the said estate, on a certain condition, to his (testator's) next heir-at-law: and reciting that he was not certain whether it was possible to entail an estate not yet purchased, he directed his executors to consult some eminent lawyers; and if they held that such entail as was expressed in the will was repugnant to law, then his personal estate should be equally divided between T. and E.: Lord Thurlow said it was impossible to argue against A's having an estate tail, and that the money must be in-

Devise of lands to be purchased to A and the heirs male of his body;

—trust executed by simply inter-

(*q*) 2 Atk. 265. [The issue will generally take successive estates tail, Grier *v.* Grier, L. R., 5 H. L. 707; even though words of limitation be superadded to "issue," Phillips *v.* James, 2 Dr. & Sm. 404, *aff.* (*diss.* K. Bruce, L. J.,) 3 D., J. & S. 72. In Hadwen *v.* Hadwen, 23 Beav. 551, words were added importing a tenancy in common, and the *children* were held to be tenants in common in tail.]

(*r*) See *post* ch. XXXIX.

(*s*) 2 Cox 247.

posing trustees to preserve contingent remainders.

vested (in lands to be settled) to the use of A and the heirs of his body, with a contingent remainder in tail to the person who should answer the description of heir male of E. at the time of her death, with remainder to the right heir of the testator; but counsel suggesting that, as this was an *executory trust*, the *court would interpose, after the estate tail to A, a limitation to trustees to preserve the contingent remainder to the heir male of E., the daughter, his lordship was of opinion that such a limitation should be inserted; and declared that the uses were to be to A and his heirs in tail male, *with remainder to trustees to support contingent remainders*, remainder to the heirs male of E., the daughter, in fee; and if she should have no heirs male, then to the heir-at-law of the testator in fee.

By interposing the estate in the trustees Lord Thurlow evidently treated the trust as executory, though the testator had in direct terms devised the purchased lands. In this respect, therefore, the case is another authority against Austen *v.* Taylor, of which, however, it may be observed, that to have made A tenant for life only of the lands to be purchased, would have created a diversity between them and the lands devised, which the testator evidently intended should be held together. (*t*) This distinguishes the case from and reconciles it with those just stated.

Austen *v.* Taylor explained.

But even where there is a clear direction to the trustees to frame the settlement, the doctrine of some of the cases requires that, to warrant the introduction of limitations in strict settlement, it should be indicated by the context that the testator did not intend an estate tail to be created according to the technical effect of the expressions used.

Indication that testator did not intend an estate tail required.

Thus, in Seale *v.* Seale, (*u*) where a testator bequeathed money to be laid out in the purchase of lands, to be settled *on A and the heirs male of his body*, Lord Cowper held that A was absolutely entitled to the money not laid out; and, though it was suggested that the court would order a strict settlement, his lordship observed that in marriage articles the children are considered as purchasers, but in the case of a will (as this was), where the testa-

Direction to settle on A and the heirs of his body.

[(*t*) But a direction to settle land, to go with a dignity which is limited to A and the heirs of his body, will be executed by making A tenant for life; for notwithstanding the limitation the dignity is wholly inalienable, Sackville-West *v.* Holmesdale, L. R., 4 H. L. 543. See also Bankes *v.* Le Despencer, 10 Sim. 576, 11 Sim. 508.]

(*u*) Pre. Ch. 421, 1 P. W. 290.

tor expresses his intent to give an estate tail, a court of equity ought not to abridge the bounty given by the testator.

This principle was carried to a great length in Blackburn *v.* Stables, (*x*) where the testator devised the remainder of his real and personal estate in trust to his nephew J., and to M. his executor, for the sole use of a son of the said J., at the age of *twenty-four; if he had no son, to a son of testator's great-nephew J; but if neither of those had a son, then to a son of testator's great-niece's daughter E., with a direction to take his (testator's) name: but on whomsoever such his disposition should take place, his will was that he should not be put in possession of any of his effects till the age of twenty-four, nor should his executors give up their trust *till a proper entail were made to the male heir by him* (the person so being entitled.) J., the nephew, had no son born at the testator's death, but his wife was then *enceinte* with a son, who was afterwards born, and attained twenty-four: Sir W. Grant, M. R., said, "It is settled that the words 'heir,' or 'heir male of the body,' in the singular number, are words of limitation, not of purchase, unless words of limitation are superadded, or there is something in the context to show that the testator did not mean to use the words in their technical sense. But there is nothing in the context of this will from which that can be collected; there is an absence of every circumstance that has commonly been relied on as showing such an intention. The word is 'heir,' not '*issue.*' There is *no express estate for life* given to the ancestor; no clause that the estate shall be *without impeachment of waste; no limitation to trustees to preserve contingent remainders;* no direction so to frame the limitation that the first taker shall not have the power of barring the entail. Everything is wanting that has furnished matter for argument in other cases: the words are therefore to be taken in their legal acceptation, and the son of J. is entitled to have the conveyance made to him *in tail male.*"

That a "proper entail be made to the male heir;"

estate tail directed.

So, in Marshall *v.* Bousfield, (*y*) where a testator devised to his wife and her heirs, upon trust that she should enjoy the estates during her life, and, after her decease, that the same *should be settled by able counsel,* and go to and amongst the grandchildren of the male kind *and their issue in tail male,* and for want of such issue, upon his female grandchildren who should be living at

To be settled upon grandchildren and

(*x*) 2 Ves. & B. 367.

(*y*) 2 Mad. 166.

their issue in tail male.

his decease; but the testator declared that the shares and proportions of the male and female grandchildren, and their respective issues, should be in such proportions as his wife should by deed or will appoint; and, for want of such appointment, to the testator's own right heirs forever. The wife appointed in favor of the testator's grandson W. and the heirs male of his body. It was objected that this was an executory trust, under which *W. would be made tenant for life, with remainder to his issue in strict settlement: but Sir T. Plumer, V. C., held that the words "in tail male" applied to the grandchildren, and that no language was used which had been held in other cases to give only an estate for life. He observed, that unless the grandchildren took an estate tail, the limitation, so far as regarded a grandson who was born after the testator's death, would be void, as being too remote. (z)

Remark on Marshall v. Bousfield.

The latter circumstance constitutes a peculiarity in this case, which otherwise afforded strong arguments in favor of a strict settlement. The estate was to be settled *by able counsel*, (a) and the word was *issue*, not heirs of the body. (b) Confidence in the case, too, is weakened by the fact, that another determination of the same judge on a question of this nature has been impeached. (c)

The reader should suspend any conclusion he may be disposed to draw from Blackburn v. Stables and Marshall v. Bousfield, until he has carefully weighed them with Lord Eldon's decision in the subsequent case of Jervoise v. Duke of Northumberland, (d) where the words were, "To my son R. I leave all my estates at" B., &c., "*to be entailed upon his male heirs*; and, failing such, to pass to his next brother, and so on from brother to brother, allowing £2500 each to be raised upon the estates for female children. The above-named estates are to be liable to all my debts at my decease, and to the fortunes left to my younger children, unless otherwise discharged. I direct my estates at M. to be sold, in order to raise money for the above-named legacies, and what falls

Devise to R. *to be entailed* upon his male heirs.

(z) But there was ground to contend that, as the limitation to the female grandchildren was confined to those living at his death, the same construction might be given to the gift to the *male* grandchildren.

(a) See White v. Carter, 2 Ed. 366, Amb. 670; Bastard v. Proby, 2 Cox 6.

(b) See judgment in Meure v. Meure, 2 Atk. 265. And Blackburn v. Stables, 2 Ves. & B. 367, *ante* p. *350.

(c) See Jervoise v. Duke of Northumberland, 1 J. & W. 559.

(d) 1 J. & W. 559.

short to be raised or charged on the other property at" B., &c. The legal estate was not in the testator. In a suit for declaring the right of all parties, Sir T. Plumer, V. C., decreed that R. was entitled to an *estate tail.* The estate was afterwards settled on the marriage of R., and was purchased under a power of sale in the settlement; but the purchaser objecting to the title, a bill was filed to enforce specific performance. It was contended for him that the trust was merely directory, and that the court, in executing it, would mould the limitations in the nature of a strict settlement; and Lord Eldon thought the contrary so doubt*ful, that he could not compel a purchaser to take the title. His lordship, indeed, expressed a strong opinion that the trust was directory; and his observations leave us not much room to doubt that, if called upon to execute it, he would have decreed a strict settlement, and not have given R. an estate tail.

Not a clear estate tail in R.

Lord Eldon in this case intimated that he did not think that the circumstances of the power being given to the devisee to charge a sum of money on the estate was a conclusive argument that he was to be only tenant for life, since, in many cases, powers are usefully given to a tenant in tail, enabling him to do certain acts more conveniently than by destroying the entail.

As to giving tenants in tail power to charge.

Most of the cases of this kind have arisen on marriage articles, (*e*) to which the same principles are applicable as to executory trusts by will, with this difference, that, as it is in every case the object of marriage articles to provide for the issue of the marriage, the nature of the instrument affords a presumption of intention in favor of the issue, which does not belong to wills; and Lord Eldon, in the last case, (*f*) intimated that the observations imputed to him in Countess of Lincoln *v.* Duke of Newcastle, (*g*) [questioning the distinction,] were to be received with this qualification. (*h*) [7]

Distinction between marriage articles and wills.

The preceding cases do not clearly demonstrate the precise ground on which courts of equity will execute a trust of the nature of those under consideration by the insertion of limitations in strict settlement. It has sometimes been

General observations upon the cases.

(*e*) See Fea. C. R. 90; 1 Prest. Est. 354.

(*f*) 1 J. & W. 571, 574.

(*g*) 12 Ves. 227, 230.

(*h*) See Rochford *v.* Fitzmaurice, 1 Conn. & L. 158, [2 D. & War. 1; Sackville-West *v.* Holmesdale, L. R., 4 H. L. 543.]

7. See Lafitte *v.* Lawton, 25 Ga. 305; Moseby *v.* Corbin, 3 A. K. Marsh. 291.

thought that the principle extends to every case in which the testator has left *anything to be done;* and that the court only requires it to be shown that the trust is executory, in order to mould the limitations in this manner. Some of Lord Eldon's observations in Jervoise *v.* Duke of Northumberland have been supposed to go to this length; (*i*) and perhaps it is difficult to place the doctrine, consistently with the liberty which has been taken with the testator's expressions, upon a narrower basis; (*k*) but, *in the actual state of the decisions, it is too much to hazard a general position of this nature. No case has yet determined that a trust *in a will* to settle lands simply on A and the heirs of his body, authorizes the courts to limit estates in strict settlement. Leonard *v.* Earl of Sussex, it is true, had only the additional circumstance of a direction that it should not be in the power of A to dock the entail, with respect to which the writer fully concurs in the observation of a learned friend, (*l*) "that this rather weakened than strengthened the presumption, that the testator intended A to be merely tenant for life;" the direction seeming rather to import that A was to take an estate tail, without the power of docking it. The case, however, was decided, and has been since generally referred to, as standing upon this ground; and it is to be observed also that Seale *v.* Seale (*m*) is a direct authority against applying the doctrine to the simple case suggested.

Whether a direction to settle on A for life, remainder to the heirs of his body, authorizes a strict settlement.

Indeed some judges have denied its application even to the case of a direction to settle lands upon A *for life,* and after his death to the heirs of his body. Such was the opinion expressed by Sir J. Jekyll in Meure *v.* Meure, (*n*) and Sir W. Grant in Blackburn *v.* Stables, though the former decided that a different construction was to be given to the word "issue," and the latter, we have seen, was disposed to yield to a declaration that the estate should be without impeachment of waste,

(*i*) See Hayes' Inq. 262, n.

(*k*) If the courts are bound to require an indication that the testator intended only an estate for life, would it not seem that by parity of reason they are obliged to adhere to the testator's language, *ultra* this object, provided the will contain no further evidence that he does not mean an estate tail, *i. e.,* by giving the ancestor an *equitable* freehold, and the heirs a *legal* remainder, thus making the heirs purchasers? Their not having done this certainly affords an argument in favor of the hypothesis suggested.

(*l*) Hayes' Inq. 262, n.

(*m*) 1 P. W. 132, *ante* 349. See also Sweetapple *v.* Bindon, 2 Vern. 536; [Harrison *v.* Naylor, 2 Cox 247; Marryat *v.* Townley, 1 Ves. 102; Randall *v.* Daniel, 24 Beav. 193.]

(*n*) 2 Atk. 265, *ante* p. *348.

or that there should be a limitation to trustees to preserve contingent remainders. (o) This distinction is certainly very refined. How can a testator intimate that he intends the object of the trust to be tenant for life more strongly than by expressly so limiting the estate? If the rule in Shelley's Case be objected as destroying that inference of intention, the answer is, that neither of the other circumstances, to which this potency of operation is admitted to belong, prevents the application of that rule. In this respect they are all equally inoperative, though they all indicate an intention to confer an estate for life only. Even, therefore, if we hesitate to subscribe to the more general (though perhaps the more reasonable) doctrine, that a direction to settle authorizes the court to adopt its own mode of settlement, without regard to the particular force of the terms used *by the testator, and require *distinct indication of intention* that the testator did not mean that the legal effect of those terms should be followed, yet even upon this principle the case under consideration would warrant the court in moulding the limitations.

Affirmative established by Bastard v. Proby.

In fact, Bastard *v.* Proby, (o) is a direct authority in favor of the affirmative. A testator devised lands to trustees, in trust to lay out the rents for the benefit of his daughter J. until twenty-one or marriage; and, on her attaining that age, directed that the trustees should, *as counsel should advise, convey settle and assure* the lands unto or to the use of, or in trust for, the said J. *for her life*, and, after her death, then *on the heirs of her body* lawfully issuing; and Sir Ll. Kenyon, M. R., directed that conveyances should be executed limiting uses in strict settlement.

Observations upon Blackburn v. Stables.

Where the testator, instead of employing technical terms, as in the cases just noticed, expresses himself in very brief informal language by directing *an entail to be made*, as in Blackburn *v.* Stables and Jervoise *v.* Duke of Northumberland, it is useless to look for a specification of particulars, as that the devisee shall be tenant for life, &c.; the general indefinite nature of the testator's language forbids it: he may be supposed to have intended to exclude a strict interpretation by the use of terms the farthest removed from technicality, and which, in their popular sense, certainly mean something very different from placing the estate in the power of the first taker. No conveyancer receiving instructions

[(o) *I. e.*, he relied on the absence of these *and other* clauses.]

(o) 2 Cox 6.

for a settlement in these terms would hesitate to insert limitations in strict settlement; and the principle upon which courts of equity proceed in the execution of directory trusts is not very widely different. Considering Lord Eldon's determination in Jervoise *v.* Duke of Northumberland, and more especially the doctrines advanced by him in his elaborate judgment in that case, it seems unsafe to rely on Blackburn *v.* Stables, to which it is extraordinary that, in his comment upon the cases, he makes no allusion. (*p*) [Where lands are directed to be settled on A and his heirs *in strict entail*, there seems little doubt that A ought to be made tenant for life only. (*q*)

To be settled "on A and his heirs in strict entail."

*"All trusts," said Lord St. Leonards, (*r*) "are in a sense executory, because a trust cannot be executed, except by conveyance, and therefore there is something always to be done. But that is not the sense which a court of equity puts upon the term 'executory trusts.' A court of equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner:—Has the testator been what is called his own conveyancer? Has he left it to the court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given you, and to convert them into legal estates?"]

Mere direction to convey does not make a trust executory.

It is clear, that where a testator devises real estate to trustees upon trusts, and then directs, that, in certain events, they shall convey the estate in a prescribed manner, the fact that the will contains such a direction does not constitute a ground for regarding the whole series of trusts as executory, and for applying

Trust in terms partly direct and partly executory.

(*p*) See further, as to executory trusts, *post* ch. XLIV., § 3; Fea. C. R. 113; Prest. Est. 387; 1 Sand. Uses 310; 1 Fonbl. Eq. 407, n.; Hayes' Inq. 264, where see strictures upon the observations of the other writers referred to. Lord Eldon, in Jervoise *v.* Duke of Northumberland, intimated his assent to the conclusion of Mr. Fearne on the subject of executory trusts, which is one of the many tributes of respect paid to the labors of this very eminent writer by those whose profound knowledge of the laws of real property enabled them to appreciate those labors. [See also Stonor *v.* Curwen, 5 Sim. 264; Boswell *v.* Dillon, 1 Dru. 291.

(*q*) Graves *v.* Hicks, 11 Sim. 536; Woolmore *v.* Burrows, 1 Sim. 526.

(*r*) Egerton *v.* Brownlow, 4 H. L. Cas. 210, 23 L. J., Ch. 406, 18 Jur. 104; and see East *v.* Twyford, 9 Hare 733; Herbert *v.* Blunden, 1 D. & Wal. 90; Randall *v.* Daniell, 24 Beav. 193; Doncaster *v.* Doncaster, 3 K. & J. 35; Fullerton *v.* Martin, 1 Dr. & Sm. 31 (personalty.)]

to the former that liberality of construction which is peculiar to trusts of this nature. (s)

The court will, of course, execute directions for any settlement that can legally be made, whether such directions are specific or general, provided the intention is apparent; but will not, in order to tie up the estate for a longer period than would be secured by making the first taker tenant for life with remainder to his sons successively in tail male, &c., appoint any persons protectors of the settlement. (t)

The court will not appoint protectors.

It is beyond the scope of the present chapter to deal with the subject of carrying into effect executory trusts, except as it bears on the rule in Shelley's Case; but it may be convenient to refer to the cases which decide that usual powers of management, such as leasing, sale and exchange, and the appointment of new trustees, may generally be inserted, whether "usual" powers are authorized or not; (u) unless the testator's meaning appears to have been fully expressed in detail, and not to admit of addition; (x) or unless by expressly authorizing par*ticular powers the context impliedly excludes others. (y) But powers to jointure and to charge with portions, however usual, cannot be inserted without express authority, for want (it is said) of a certain guide to the amount. (z)

Powers authorized by executory trust to settle.

III.—It may be useful, as supplementary to the preceding discussion of the rule in Shelley's Case, to state, for the use of the student, the practical bearings of the alternative whether the heir takes by descent or by purchase; which

Practical bearings of the rule in Shelley's Case.

(s) Franks v. Price, 3 Beav. 182. [See also Jackson v. Noble, 2 Kee. 590; In re Nelley's Trusts, W. N. 1877, p. 120.

(t) Banks v. Le Despencer, 11 Sim. 508; but see Woolmore v. Burrows, 1 Sim. 527.

(u) Turner v. Sargent, 17 Beav. 515; Wise v. Piper, 13 Ch. D. 848. And see Lindow v. Fleetwood, 6 Sim. 152.

(x) Wheate v. Hall, 17 Ves. 80. See also Horne v. Barton, Jac. 437.

(y) Hill v. Hill, 6 Sim. 144; Pearse v. Barron, Jac. 158.

(z) Grier v. Grier, L. R., 5 H. L. 688. See Sackville-West v. Holmesdale, L. R., 4 H. L. 543, where the settlement was to be with such powers as the trustees should think proper. In this case Lord Cairns said, p. 577, "I cannot think that, if an executory instrument on its proper construction authorizes the insertion of powers of jointuring and portioning, the absence of any mention of amount ought to be an insurmountable difficulty."

As to the effect of a direction that the legacies or shares of daughters shall be "settled on their marriage," or "on themselves strictly," see Magrath v. Morehead, L. R., 12 Eq. 491; Loch v. Bagley, L. R., 4 Eq. 122. And as to adding a restraint on anticipation by *feme coverte*, Symonds v. Wilkes, 11 Jur. (N. S.) 659 (articles.)

will be best shown by suggesting a case of each kind. Suppose, then, a devise *to A* for life, remainder to the heirs of his body; and suppose another devise to the use of *trustees for the life of B*, in trust for B, remainder to the use of the heirs of his body. In the former case, the ancestor being tenant in tail, the heirs of his body can claim only derivatively through him by descent *per formam doni*, and, therefore, if A die in the lifetime of the testator, the heir (unless the will were made or republished subsequently to 1837) takes nothing, the devise to his ancestor having lapsed. (*a*) [8]

As to lapse.

On the other hand, in the latter supposed case, if B should die in the testator's lifetime, it would not affect his heir, who claims not derivatively through his ancestor, but originally in his own right by purchase; and who would, therefore, be entitled under the devise, notwithstanding his ancestor's death in the lifetime of the testator. The estate tail would go by a sort of *quasi* descent (*b*) through *all* the heirs of the body of the ancestor, first exhausting the inheritable issue of the first taker (and which issue would claim by descent), and then devolving upon the collateral lines; the head of each stock or line of issue claiming as heir of the body of the ancestor by purchase, *but taking in the same manner as such heir would have done under an estate tail vested in the ancestor.

Another difference to be observed is, that where the heir takes *by descent*, the property, if in possession, devolves upon him, subject to the dower of the widow of his ancestor, if he were married at his death (provided, in regard to the dower of a widow, whose marriage was prior to or on the 1st of Jan., 1834, (*c*) his estate were *legal*, and not equitable only), or subject to curtesy, if

As to dower and curtesy.

(*a*) Brett *v.* Rigden, Plow. 340; Hartop's Case, Cro. El. 243; Hutton *v.* Simpson, 2 Vern. 722; Hodgson *v.* Ambrose, Dougl. 337, 3 B. P. C. Toml. 417; Wynn *v.* Wynn, Id. 95; Warner *v.* White, Id. 435; [Goodright *v.* Wright, 1 P. W. 397; Fuller *v.* Fuller, Cro. El. 422.] The abstract prefixed to Warner *v.* White is singularly inaccurate.

8. In Daly *v.* James, 8 Wheat. 495, a devise to a class of persons "and their heirs forever or such of them as shall be living at the death of A," was held to be within the rule in Shelley's Case, and all the persons of the class being dead, their heirs could not take as purchasers. And a devise to "A and her heirs" was construed according to Shelley's Case, and lapsed by A's death before the testator, although the will was republished after A's death, Campbell *v.* Jamison, 8 Penna. St. 498. But where a limitation is to B "and the male heirs of his body forever," on the death of A without issue, and B dies before A, B's oldest son takes the estate in tail, Riggs *v.* Sally, 15 Me. 406.

(*b*) Mandeville's Case, Co. Lit. 26 b, *ante* p. *62. See Fea. C. R. 80.

(*c*) Stat. 3 and 4 Will. IV., c. 105.

the ancestor were a married woman, who left a husband by whom she had had issue born alive, *capable of inheriting*, and which attaches whether the estate be legal *or* equitable. On the other hand, where the heir takes by purchase, of course none of these rights, which are incident to estates of inheritance, attach, the ancestor being merely tenant *for life*.

Alienation by an enrolled conveyance.

And, lastly, if the heir of the body take by descent, his claim may be defeated by the alienation of his ancestor by means of a conveyance enrolled, now substituted for a common recovery, the right to make which is, we have seen, an inseparable incident to an estate tail. (*d*) On the other hand, the heir claiming by purchase is unaffected by the acts of his ancestor, except so far as those acts [might before the statute 8 and 9 Vict., c. 106, § 8,] have happened to destroy the contingent remainder of such heir, if not supported (as it always should [have been]) by a preceding vested estate of freehold. The conveyance, it should be observed, of a person becoming tenant in tail by force of the rule in Shelley's Case, under a limitation to the heirs of his body not *immediately* expectant on his estate for life, had no effect upon the mesne estates, unless they happened to be legal remainders contingent and unsupported. Thus, in the case of a limitation to A for life, remainder to his first and other sons in tail male, remainder to the heirs of the body of A, with remainders over; A, being tenant in tail by the operation of the rule, may make a disentailing assurance; but though such assurance will bar the remainders ulterior to the limitation to the heirs of his body, it will not affect the intervening estate of the first and other sons, unless there were no son born at the time, and no estate interposed to preserve the remainders of the sons, in which case such remainders, being contingent, would, [before the statute above referred to, have] clearly [been] destroyed. [That statute puts it out of the power of the owner of *the preceding estate of freehold to destroy the contingent remainders depending thereon.]

Operation of disentailing assurance upon estates intervening between the freehold and the limitation to the heirs.

Further points suggested.

It may be useful to illustrate the practical consequences of a limitation of another description. Suppose a devise to A and B *jointly* for their lives, remainder to the heirs of their bodies; if they were *not* husband and wife (or, it would seem, persons

(*d*) *Ante* p. *19.

who may lawfully marry), they would be *joint* tenants for life, with *several* inheritances in tail. (*e*) An enrolled conveyance by either would acquire the fee-simple in an undivided moiety, and they would thenceforward be tenants in common: by parity of reason, a similar conveyance by both would comprise the entirety.

If the limitations were to them *successively* for life, A would be tenant for life of the entirety, with the inheritance in tail in one moiety, subject, as to the latter, to B's estate for life, and B would be tenant for life in remainder of one moiety, and tenant in tail in remainder of the other moiety. A being tenant in tail in possession, might make a disentailing assurance, which would give him the fee simple in a moiety of the inheritance, but would not, as before shown, affect B's estate for life in remainder in that moiety. B, on the other hand, having no immediate estate of freehold, could not during the life of A, and without his concurrence, acquire, by means of an enrolled conveyance, a larger estate than a base fee determinable on the failure of issue inheritable under the entail. A and B might conjointly convey the absolute fee simple in the entirety.

Under a devise to A and B jointly for their lives, with remainder to the heirs of their bodies, A and B being persons who might lawfully marry, would be joint tenants in tail; if actually husband and wife, they would be tenants in tail by entireties. (*f*) In the former case, each might acquire the fee simple in his or her own moiety, by making a disentailing assurance thereof; but, in the latter case, the concurrence of both would be essential, on the ground of the unity of person of husband and wife, (*g*) and the deed of course must be acknowledged by the wife. In each of the suggested cases, if the estate remained unchanged at the decease of either of the two tenants in tail, it would devolve to the survivor, according to the well-known rule applicable as well to joint tenancies as tenancies by entireties.

[(*e*) See Lit., § 283; Ex parte Tanner, 20 Beav. 374.

(*f*) Co. Lit. 187 b.

(*g*) See Green d. Crew v. King, 2 W. Bl. 1211.]

* CHAPTER XXXVII.

WHAT WILL CONTROL THE WORDS "HEIRS OF THE BODY."

I. *Superadded Words of Limitation.*
II. *Words of Modification inconsistent with the Devolution of an Estate Tail,* [*with or without Words of Limitation superadded.*]
III. *Clear Words of Explanation.*

Effect of context in controlling "heirs of the body."

I.—It has been already shown that a devise to A and to the heirs of his body, (*a*) or to A *for life* and after his death to the heirs of his body, (*b*) vests in A an estate tail. On a devise couched in these simple terms, indeed, no question can arise; for wherever the contrary hypothesis has been contended for the argument for changing the construction of the words has been founded on some expressions *in the context;* as where words of limitation are superadded to the devise to the heirs of the body; the effect of which has been often agitated, and will here properly form the first point for inquiry.

Similar limitation superadded is inoperative.

Where the superadded words amount to a *mere repetition of the preceding words of limitation,* they are, of course, inoperative to vary the construction. *Expressio eorum quæ tacite insunt nihil operatur.*

Thus, in Burnet *v.* Coby, (*c*) where a testator devised lands to A for life, and after his decease to the heirs male of the body of A *and the heirs male of such issue male,* it was held that A had an estate tail, [and the settled distinction was said to be that where, after a limitation to the ancestor, the word "heir" is in the singular number, and a limitation made to the issue of such heir, the word heir is considered as a word of purchase, (*d*) and a *descriptio personæ;* but wherever the

(*a*) *Ante* p. *324.

(*b*) *Ante* p. *332.

(*c*) 1 Barn. B. R. 367. See also Shelley's Case, 1 Rep. 93; [Minshull *v.* Minshull, 1 Atk. 411;] Legatt *v.* Sewell, 2 Vern. 551, 4 Eq. Cas. 394, pl. 7, 1 P. W. 87, cit. 2 Ves. 657, where the trust was *executory,* and would, it is clear, according to the doctrine now established, be executed by a strict settlement. See *ante* p. *343.

[(*d*) See *ante* p. *326.]

word "heirs" is in the plural number, and a limitation made to the issue of such heirs, the word heirs is considered as a word of descent and not of purchase.]

*It is also well established that a limitation to the *heirs general* of the heirs of the body, is equally ineffectual to turn the latter into words of purchase.

Construction not varied by superadded limitation to *heirs general* of heirs of the body.

Thus in Goodright d. Lisle *v.* Pullyn, (*e*) where a testator devised lands to N. for life, and after his decease then he devised the same unto *the heirs male of the body* of N. lawfully to be begotten *and his heirs forever;* but if N. should happen to die without such heir male, then over; the court was of opinion that the devise vested an estate tail in N. A similar decision was made by the Privy Council on a similar devise. (*f*)

So, in Wright *v.* Pearson, (*g*) where the devise was to R. and his assigns for his life, remainder to trustees to support contingent remainders, remainder to the use of *the heirs male of the body* of R. lawfully to be begotten *and their heirs;* provided that in case R. should die without leaving any issue male of his body living *at his death,* then the testator subjected the premises to certain charges, and, in default of such issue male of R., he devised the premises to certain grandchildren, or such of them as should be living at the time of the failure of issue of R.; Lord Keeper Henley held it to be an estate tail in R.

Again, in Denn d. Geering *v.* Shenton, (*h*) where the testator devised lands to S. to hold to him and *the heirs of his body* lawfully to be begotten *and their heirs forever,* chargeable with an annuity to M. for life; but in case S. should die without leaving issue of his body, then the testator devised the lands to W. and his heirs, chargeable as aforesaid, and also subject to the payment of £100 to A *within one year after W. or his heirs should become possessed of the premises.* It was contended, on the authority of Doe *v.* Laming, (*i*) that the words *heirs of the body* might be words of purchase, with these superadded words of limitation, and that this construction was much strengthened by the

(*e*) 2 Ld. Raym. 1437, 2 Stra. 729.

(*f*) Morris d. Andrews *v.* Le Gay, noticed 2 Burr. 1102, and 2 Atk. 249, and more fully and somewhat differently stated *nom.* Morris *v.* Ward, by Lord Kenyon, 8 T. R. 518.

(*g*) 1 Ed. 119, Amb. 358, Fea. C. R. 126, where the case is very fully commented on. See also Alpass *v.* Watkins, 8 T. R. 516.

(*h*) Cowp. 410. See also Alpass *v.* Watkins, 8 T. R. 516.

(*i*) 2 Burr. 1100, as to which, see *post.*

circumstance of the legacy of £100, which must have referred to a dying without issue at the death, and not to an indefinite failure of issue, which might happen a hundred years hence. But Lord Mansfield, and the rest of the Court of K. B., held it to be a clear estate tail in S.

*Even if the devise over had been made in express terms to depend on the prior devisee leaving no issue *at the time of his death*, this would not, according to Wright *v.* Pearson, (*k*) have prevented the prior devisee taking an estate tail.

So, in Measure *v.* Gee, (*l*) where the devise was to J. for his life, remainder to trustees to preserve contingent remainders, and after the decease of J. the testator devised the premises to *the heirs of the body* of J. lawfully to be begotten *his, her and their heirs and assigns forever;* but in case there should be a failure of issue of J. lawfully to be begotten, then over. It was contended that the early cases on this subject had been shaken by modern decisions; but the Court of K. B. considered them to be irrelevant, (*m*) and held that the devise vested an estate tail in J.

Nor by interposition of estate to preserve contingent remainders.

This case, as well as Wright *v.* Pearson, shows that the interposition of trustees to preserve contingent remainders is inoperative to invest superadded words of limitation with any controlling efficacy.

The next case in order is Kinch *v.* Ward, (*n*) where a testator devised freehold and leasehold lands to trustees, in trust to permit his son T. to receive the rents for his life, and, after his decease, the testator devised the same to *the heirs of the body* of his said son lawfully begotten *their heirs, executors, administrators and assigns forever;* but in case he should die without issue, then over. It was assumed in the discussion of another question, that the devise of the freehold lands vested in T. an estate tail.

As to heirs of the body being directed to assume testator's name.

And it is clear that the circumstance of the heirs of the body being directed to assume the testator's name does not constitute a ground for varying the construction,

(*k*) *Ante* p. *360.

(*l*) 5 B. & Ald. 910. See also King *v.* Burchell, 1 Ed. 424; Denn *v.* Puckey, 5 T. R. 299; Frank *v.* Stovin, 3 East 548, where the word was *issue*, as to which see ch. XXXIX.

(*m*) The only case cited in Measure *v.* Gee, which afforded a shadow of opposition to the principle of the cases in the text was Doe *v.* Goff, 11 East 668, which had other circumstances, and has been, as we shall presently see, itself overruled by the highest authority.

(*n*) 2 S. & St. 411.

although the effect is, by enabling the ancestor to acquire the fee simple, to place within his power the means of rendering the injunction nugatory; (o) this being, in fact, merely one of the consequences which a testator does not usually intend or foresee, when he employs words that, in legal construction, make the first taker *tenant in tail, and which consequences, whether apprehended or not, do not authorize the testator's judicial expositor to divert his bounty into another channel, by giving to his language a strained construction, which would make it apply to a different class of objects. (p)

Thus, in Nash v. Coates, (q) where a testator devised lands to trustees and the survivor of them, and the heirs of such survivor, in trust for F. W., then an infant, till he should arrive at the age of twenty-one years, upon his legally taking and using the testator's surname; and then, upon his attaining such age and taking that name, *habendum* to him for life; and *from and after his decease*, to hold to the trustees and the survivor of them and the heirs of such survivor, to preserve contingent remainders, in trust for the *heirs male of F. W.*, taking the testator's name, *and the heirs and assigns of such male issue forever;* but in default of such male issue, then over. It was held that the trustees did not take the legal estate in the lands devised, (r) but that F. W. had a legal estate tail in them on his coming of age and adopting the testator's surname.

Result of the cases.

Down to the very latest period then, we have a confirmation, if confirmation were wanted, of the inadequacy of words of limitation in fee, annexed to *heirs of the body*, to control their operation.[1] The only remark suggested by the later decisions

(o) Such a condition, too, if imposed on a person taking an estate tail by purchase, would (unless made a condition precedent) be liable to be defeated by an enrolled conveyance, which, like a common recovery, destroys all estates limited in defeasance of, as well as those which are made to take effect after the determination of, the estate tail.

[(p) Per Lord Kingsdown, Atkinson v. Holtby, 10 H. L. Cas. 332, acc.]

(q) 3 B. & Ad. 839. [See also Toller v. Attwood, 15 Q. B. 929, *post* p. *370.]

(r) See *ante* pp. *319, *335, n.

1. A devise to A for life, and if he die leaving heirs of the body, then to "go to and vest in such heirs, their heirs and assigns forever," gives the heirs an estate by purchase, Valentine v. Borden, 100 Mass. 273; or "to the use of such heirs, their executors and assigns," Bradby v. Mosby, 3 Call 57; or to A "and to the heirs of her body, *and to their heirs and assigns*," gives only a life estate to A, Blair v. Van Blarcum, 71 Ill. 290; Lemacks v. Glover, 1 Rich. Eq. 141; or "to the heirs of his body *and their descendants*," Jillson v. Wilcox, 7 R. I. 515; so to A for life "and to his eldest male heir and after his death to said male heirs and assigns forever," Canedy v. Haskins, 13 Metc. 389; so to A for life, and after his death to his heirs

is an expression of surprise that adjudication should be deemed necessary on a point so clearly settled by anterior decisions; and our surprise is greatly increased, when, in such a state of the authorities, we find [two] distinguished judges attempting to found a distinction between the two cases, on the mere existence in one, and the absence in the other, of superadded words of limitation. (*s*)

Distinction where the words of limitation change the course of descent

But it seems that if the superadded words of limitation *operate to change the course of descent*, they will convert the words on which they are engrafted into words of purchase; as in the case of a devise to a man for life, remainder to his *heirs* and the *heirs female* of their bodies. (*t*) And the same principle of course would apply where a limitation to the heirs *male* of the body is annexed to a limitation to the heirs *female*, *and *vice versa*; but the books contain no such case, and the doctrine rests entirely on the position *arguendo* of Anderson in Shelley's Case, which, however, has been since much cited and recognized.

Position of Mr. Preston examined.

An eminent writer has laid it down (*u*) "that as often as the superadded words are included in, and do *not* in their extent *exceed* the preceding words, but the words *heirs, &c.*, in the several parts of the gift are in terms, or at least in construction, of equal extent, the latter words are surplusage, and the preceding words, as connected with the limitation to the ancestor, will be taken to be words of limitation."

The position, that the preceding words are words of limitation where the superadded words do *not* exceed them, seems to be the reverse of the established rule; (*x*) the very case put by Anderson as an instance of their being words of purchase is one in which the superadded words *narrowed* the preceding words; and, on the other

male, *habendum*, "to them and to their heirs and assigns forever share and share alike," Tanner *v.* Livingston, 12 Wend. 83; or "to descend to the heirs of her body share and share alike and to their heirs and assigns forever," Lillibridge *v.* Ross, 31 Ga. 730; or to "his heirs as tenants in common, and their respective heirs and assigns forever," Findlay *v.* Riddle, 3 Binn. 139; or to A "and to his male children lawfully begotten and their heirs forever to be divided equally among them and their heirs forever," Sisson *v.* Seabury, 1 Sumn. C. C. 251. See also next preceding chapter, note 1; and for Pennsylvania cases, Anderson on "The Word Issue," there referred to.

(*s*) See judgment of Bayley, J., in Doe d. Bosnall *v.* Harvey, 4 B. & Cr. 623, [and of Sugden, C., in Montgomery *v.* Montgomery, 3 Jo. & Lat. 52; and see observations on the later case, *post*.]

(*t*) Per Anderson, in Shelley's Case, 1 Rep. 95 b.

(*u*) 1 Preston on Estates 353.

[(*x*) And see Fea. C. R. 183. But see Hamilton *v.* West, 10 Ir. Eq. Rep. 75, stated ch. XXXIX.]

hand, we have seen that in all the cases in which the superadded words have been held to be inoperative they have been either equal to, or more extensive than, the words of limitation upon which they were engrafted. (*y*)

Effect of superadded words of modification inconsistent with an estate tail.

II.—We next proceed to inquire as to the effect of coupling a limitation to *heirs of the body* with words of modification importing that they are to take concurrently or distributively, or in some other manner inconsistent with the course of devolution under an estate tail, as by the addition of the words "*share and share alike*," or "*as tenants in common*," or "*whether sons or daughters*," or "*without regard to seniority of age or priority of birth*." In such cases the great struggle has been to determine whether the superadded words are to be treated as explanatory of the testator's intention to use the term *heirs of the body* in some other sense, and as descriptive of another class of objects, or are to be rejected as repugnant to the estate which those words properly and technically create. It will be seen by an examination of the following cases, that, after much conflicting decision and opinion, the latter doctrine has prevailed, [even where words of limitation are superadded to words of modification,] and it seems to stand on the soundest principles of construction. Those principles were violated, it is conceived, in permitting words of a clear and ascertained signification to be *cut down by expressions from which an intention equally definite could not be collected. The inconsistent clause shows only that the testator intended the heirs of the body to take in a manner in which, as such, they could not take; not that persons other than heirs were meant to be the objects. To make expressions of this nature the ground of such an interpretation is to sacrifice the main scope of the devise to its details. The courts have, therefore, wisely rejected the construction which reads heirs of the body with such a context as meaning *children* and thereby restricts the testator's bounty to a narrower range of objects; for, it will be observed, that although children are included in heirs of the body, yet the converse of the proposition does not hold, for an estate tail is capable of transmission through a long line of objects whom a gift to the children would never reach (as grandchil-

Expressions superadded to the limitation "to heirs of the body."

(*y*) See *ante* pp. *359, *360.

dren and more remote descendants); to say nothing of the difference in the *order* of its devolution.

This rule of construction is supported by a series of decisions, commencing from an early period, and sufficiently numerous and authoritative to outweigh any opposing decision and *dicta* which can be adduced.

Thus, in Doe d. Candler *v.* Smith, (*z*) where a testator devised his freehold lands to his daughter A, and *the heirs of her body* lawfully to be begotten, forever, *as tenants in common and not as joint tenants;* and in case his said daughter should happen to die before twenty-one, or without having issue on her body lawfully begotten, then over; Lord Kenyon and the other Judges of K. B. held that the daughter took an estate tail.

"Forever as tenants in common, and not as joint tenants."

So, in Pierson *v.* Vickers, (*a*) where a testator devised his estates at B. unto his daughter A, and to the heirs of her body lawfully to be begotten, *whether sons or daughters, as tenants in common and not as joint tenants;* [2] and in default of such issue, over; Lord Ellenborough and the other Judges of K. B. held, on the authority of the last case, and Doe *v.* Cooper, (*b*) that the daughter took an estate tail.

"Whether sons or daughters as tenants in common," &c.

*Again, in Bennett *v.* Earl of Tankerville, (*c*) where the devise was to the use of A and his assigns for his life without impeachment of waste, and after his decease to *the heirs of his body, to take as tenants in common and not as joint tenants;* and in case of his decease without issue of his body, then over: Sir W. Grant, M. R., held that the devisee took an estate tail.

(*z*) 7 T. R. 532. It should be stated that the reader will not find in this and some of the other cases of the same class any distinct recognition of the principle stated in the text; but as that principle is sanctioned by the later cases, and affords a more intelligible and definite guide than the doctrine of general and particular intention on which some of these decisions proceed, the writer has felt himself authorized to rest them on the former ground. An able and extended examination of most of the cases stated in this chapter may be found in Mr. Hayes' "Inquiry."

(*a*) 5 East 548. [See Grimson *v.* Downing, 4 Drew. 125, where the estate to A was expressly for life.]

2. So a limitation over to issue "as tenants in common," Cushney *v.* Henry, 4 Paige 345; or to issue "and their heirs" as tenants in common, Tongue *v.* Nutwell, 13 Md. 415; or "in the proportions to which they would be entitled under the intestate laws," Robins *v.* Quinliven, 79 Penna. St. 333; or "to heirs or issue, their heirs and assigns," as tenants in common, Nebinger *v.* Upp, 13 Serg. & R. 68.

(*b*) 1 East 229, stated ch. XXXIX.

(*c*) 19 Ves. 170.

So, in Doe d. Cole *v.* Goldsmith, (*d*) where a testator devised his lands to his son F. to hold to him and his assigns for his natural life, and immediately after his decease the testator devised the same unto the heirs of his body lawfully to be begotten, in such *parts, shares and proportions, manner and form as F. should by will or deed devise or appoint,* and in default of such heirs of his body lawfully to be begotten, then *immediately after his decease* the testator devised the premises over to another son, J., in fee. It was held in C. P. that F. took an estate tail. Gibbs, C. J., observed that it was the testator's evident intent that the estate should not go over to J. until all the "heirs of the body" of F. were extinct.

In such shares, &c., as F. should appoint.

In this and several of the preceding cases, much stress was laid on the words "in default of issue," or "in default of heirs of the body," occurring in the devise over, or rather in the clause introducing such devise, as demonstrating a "general intent" that the estate was not to go over until a general failure of issue of the first taker; but it is difficult to understand how this intention could be rendered more distinctly and unequivocally apparent by such referential language than by an *express* devise to these very objects [viz., "heirs of the body."]

Observations.

We now proceed to the important case of Jesson *v.* Wright, (*e*) which was as follows: A testator devised to W. certain real estate for the term of his natural life, he keeping the buildings in tenantable repair; and after W.'s decease devised the same to the *heirs of the body of W.* lawfully issuing, *in such shares* and proportions *as W.* by deed or will *should appoint,* and for want of such appointment, then to *the heirs of the body of W. lawfully issuing, share and share alike, as tenants in common,* and if but one *child,* the whole to such only *child;* and for want of *such* issue, then over. It was held in K. B. that W. took an estate for life only, with remainder to his children for life as tenants in common. The House of Lords after a very full argument reversed the decision. Lord Eldon observed: "It is *definitively settled, as a rule of law, that where there is a particular and a general or paramount intent, the latter shall prevail, and courts are bound to give effect to the paramount intent. (*f*) The decision of the court below has pro-

In such shares as W. should appoint, *and if but one child,* &c.

Doe *v.* Jesson in K. B.; reversed in D. P.

Jesson *v.* Wright.

(*d*) 7 Taunt. 209, 2 Marsh. 517.

(*e*) 2 Bligh 1; from which the statement of the will is here taken.

(*f*) By "general intent" Lord Eldon

ceeded upon the notion that no such paramount intent was to be found in the will." He then read the devise, observing, that if he stopped at the end of the first devise to W., it was clear that he was to take for life only; if at the end of the first following words, "lawfully issuing," he would, notwithstanding the express estate for life, be tenant in tail: "and in order to cut down this estate," continued his lordship, "it is absolutely necessary that a particular intent should be found to control and alter it, as clear as the general intent here expressed. The words 'heirs of the body' will indeed yield to a particular intent that the estate shall be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator, *but that must be clearly intelligible and unequivocal.* The will then proceeds, 'in such shares and proportions as he the said W. shall by deed, &c., appoint.' Heirs of the body mean one person at any given time, but they comprehend all the posterity of the donee in succession. W. therefore could not strictly and technically appoint to heirs of the body. This is the power, and then come the words of limitation over in default of execution of the power—'and for want of such gift, &c., then to the heirs of the body, &c., share and share alike, as tenants in common.' It has been powerfully argued (and no case was ever better argued at this bar), that the appointment could not be to all the heirs of the body in succession forever, and, therefore, that it must mean a person, or class of persons, to take by purchase; that the descendants in all time to come could not be tenants in common; that 'heirs of the body,' in this part of the will, must mean the same class of persons as the 'heirs of the body' among whom he had before given the power to appoint; and, inasmuch as you here find a child described as an heir of the body, you are therefore to conclude that heirs of the body mean nothing but children. Against such a construction many difficulties have been raised on the other side; as, for instance, how the children should *take in certain events, as where some of the children should be born and die before others come into being. How is this limitation in default of appointment in such case to be construed and applied? The defendants in error contend, upon the

Lord Eldon's observations.

Jesson v. Wright.

must be understood to mean an intent to include heirs of the body in the gift. It is submitted that those parts of the judgment in which he refers to the uncontrolled force of the words *heirs of the body* contain a more satisfactory explanation of the principle than these passages. Lord Redesdale, it will be seen, strenuously insists upon this being the true ground of the decision.

construction of the words in the power, and the limitation in default of appointment, that the words 'heirs of the body' mean some particular class of persons within the general description of heirs of the body; and it was further strongly insisted that it must be children, because in the concluding clause of the limitation in default of appointment the whole estate is given to one *child*, if there should be only one. Their construction is, that the testator gives the estate to W. for life, and to the children as tenants in common for life. How they could so take, in many of the cases put on the other side, it is difficult to settle. Children are included undoubtedly in heirs of the body; and if there had been but one child, he would have been heir of the body, and his issue would have been heirs of the body; but *because children are included in the words 'heirs of the body,' it does not follow that heirs of the body must mean only children*, where you can find upon the will a more general intent comprehending more objects. (*g*) Then the words '*for want of such issue*' which follow, it is said, mean for want of children; because the word *such* is referential, and the word *child* occurs in the limitation immediately preceding. On the other hand it is argued, that heirs of the body, being the general description of those who are to take, and the words 'share and share alike as tenants in common,' being words upon which it is difficult to put any reasonable construction, children would be merely objects included in the description, and so would an only child. The limitation, 'if but one child, then to such only child,' being, as they say, the description of an individual who would be comprehended in the terms 'heirs of the body,' 'for want of such issue,' they conclude, *must mean for want of heirs of the body*. If the words 'children' and 'child' are so to be considered as merely within the meaning of the words *heirs of the body*, which words comprehend them and other objects of the testator's bounty, (and I do not see what right I have to restrict the meaning of the word *issue*,) (*h*) there is an end of the question."

*Lord Redesdale said: "There is such a variety of combination in words, that it has the effect of puzzling those who are to decide upon

[(*g*) See a similar clause similarly treated in Dunk *v.* Fenner, 2 R. & My. 566.]

(*h*) But these words, it is submitted, derive all their force from the terms of the preceding devise, having in themselves no independent operation whatever; for it is settled that the words "in default of such issue," preceded by a gift to children, refer to those objects. See Rex *v.* Marquess of Stafford, 7 East 521; Doe d. Tooley *v.* Gunniss, 4 Taunt. 313; and other cases stated *post*.

the construction of wills. It is therefore necessary to establish rules, and important to uphold them, that those who have to advise may be able to give opinions on titles with safety. From the variety and nicety of distinction in the cases, it is difficult for a professional adviser to say what is the estate of a person claiming under a will. It cannot at this day be argued that, because the testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be canceled or overthrown. In Colson *v.* Colson, (*i*) it is clear that the testator did not mean to give an estate tail to the parent. If he meant anything by the interposition of trustees to support contingent remainders, it was clearly his intent to give the parent an estate for life only. It is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression or necessary implication. In this case it is argued that the testator did not mean to use the words 'heirs of the body' in their ordinary legal sense, because there are other inconsistent words; but it only follows that he was ignorant of the effect of the one or of the other. All the cases but Doe *v.* Goff (*k*) decide that the latter words, unless they contain a clear expression or a necessary implication of some intent contrary to the legal import of the former, are to be rejected. *That the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is, that technical words shall have their legal effect unless from subsequent inconsistent words it is very clear that the testator meant otherwise.* In many cases,—in all, I believe, except Doe *v.* Goff (*l*)—it has been held that the words '*tenants in common*' do not overrule the legal sense of words of settled meaning. In other cases, a similar power of appointment has been held not to overrule the meaning and effect of similar words. It has been argued, that heirs of the body cannot take as tenants in common; *but it does not follow that the testator did not intend that heirs of the body should take, because they cannot take in the mode prescribed.* This only follows, that *having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and *the words of modification are to be rejected.* Those who decide upon such cases ought not to rely on petty distinctions, which

Jesson *v.* Wright.

Lord Redesdale.

Lord Redesdale's statement of the principle of the decision

(*i*) 2 Stra. 1125.

(*k*) *Infra.*

(*l*) But see cases *infra.*

only mislead parties, but look to the words used in the will. The words 'for want of *such* issue' are far from being sufficient to overrule the words 'heirs of the body.' (*m*) They have almost constantly been construed to mean an indefinite failure of issue, and of themselves have frequently been held to give an estate tail. In this case the word 'issue' cannot be construed children, except by referring to the words 'heirs of the body,' and in referring to those words they show another intent. The defendants in error interpret 'heirs of the body' to mean children only, and then they say the limitation over is in default of children; but I see no ground to restrict the words 'heirs of the body' to mean children in this will."

Effect of limitation to preserve contingent remainders.

So in Doe d. Bosnall *v.* Harvey, (*n*) where a testator devised his real *estate*, subject to his debts and legacies, to T. for the term of his natural life, and after the determination of that estate, to A and B and their heirs during the life of T. to preserve contingent remainders; and after the decease of T. the testator devised the same to and among all and every *the heirs of the body of T., as well female as male, lawfully to be begotten, such heirs, as well female as male, to take as tenants in common, and not as joint tenants;* and for default of such issue, over. The lands were gavelkind. It was held that T. took an estate tail; Abbott, C. J., observing, "that though the heirs could not take by descent *as tenants in common*, but would be coparceners, yet it was not to be inferred because they could not take in the particular mode prescribed by the testator, that therefore they were not to take at all."

"As well female as male to take as tenants in common," &c.

Again, in Doe d. Atkinson *v.* Featherstone, (*o*) where a testator devised to J., and E. his wife, for the term of their natural lives, and for the life of the longer liver of them, and after the decease of the survivor, he devised to *the heirs of the body of E.* by J. already begotten or to be begotten, to *be equally divided amongst them, share and share alike.*[3] It was held,

"Equally to be divided amongst them, share and share alike."

(*m*) It could not for a moment be contended that these words *overruled heirs* of the body. The argument was, that if those words, as used in the preceding devise, meant *children*, (but which his lordship shows incontrovertibly they did not,) then the words "for want of such issue," meant for want of such *children*. See p. *367, n. (*d*).

(*n*) 4 B. & Cr. 610.

(*o*) 1 B. & Ad. 944.

3. A devise to A for life, and "*at her death to be equally divided* among the heirs of her body," is not within the rule in Shelley's Case, Sharman *v.* Jackson, 30 Ga. 224; Prescott *v.* Prescott, 10 B.

on the authority of *Jesson v. Wright, that E. took [an] estate tail, and not (as had been contended) [an] estate for life, with remainder to the children [of E. and J.

Mon. 56; Ellis v. Merrimack Bridge, 2 Pick. 243; (by statute) Bowers v. Porter, 4 Pick. 198; Payne v. Sale, 2 Dev. & Bat. 455; Swain v. Rascoe, 2 Ired. L. 200; Self v. Tune, 6 Munf. 470 (but see, *contra*, Moore v. Brooks, 12 Gratt. 135); nor to his widow for life, "and after her death *to be divided* among all my children," Arnold v. Arnold, 11 B. Mon. 93; nor to A for life, "and at her death to be equally divided among her children," Williams v. Sneed, 3 Coldw. 533; or "equally divided between the lawful heirs of his body," meaning children, Vaden v. Hance, 1 Head 300; nor a devise to A for life, remainder to his widow for life, remainder "to his heirs to *be divided* among them *as the law directs*," the law being that which was in force at the date of the will, altered before testator's death, Quick v. Quick, 6 C. E. Gr. (N. J.) 13. See also next preceding chapter, note 1.

In Prescott v. Prescott, 10 B. Mon. 56, 58, Marshall, C. J., said: "It is true, the words 'heirs of the body' are appropriate words of limitation, and commonly and properly used for the creation of an estate tail, which is an estate to a person and the heirs (general or special) of his body. But it is also well settled by numerous decisions that not only 'heirs of the body,' but the more general word 'heirs,' or the more specific terms 'heirs male, or heirs female of the body, or of two bodies,' may be used and operate as words of purchase. It is a question of intention, whether these words are used to denote the whole line of heirs of the sort described, to take in succession as such heirs, or to denote only a particular person or class of persons who may come under that description at the time. When used in the former sense, they are words of limitation, defining or limiting the previous estate to which they apply. When used in the latter sense, they operate merely as *designatio personæ* or *personarum*, and are held to be words of purchase giving a new estate to the person designated. If it be conceded that the rule in Shelley's case, 'that wherever the ancestor takes an estate for life, and in the same conveyance an estate is limited to his heirs or the heirs of his body, he will be vested with the fee, and his heirs will take by descent, and not by purchase,' (4 Bibb 390,) is authoritative here, and applicable to a devise of slaves, its application is still subject to the question of the sense in which the word 'heirs, or heirs of the body' are used. And although it may be *prima facie* inferred that the testator used the words as embracing the whole line of his heirs in succession, this inference may be overthrown by circumstances indicating with sufficient certainty a contrary intention, 'to use the words in a more restrictive and untechnical sense, and to point out such individual person (or persons) as should be the heir, &c., of the tenant for life at his decease;' (Fearne on Rem. 188–9); and if the words are so used, the application of the rule is repelled: (Ib.) * * * We adhere to the principle of the case of McNair's Administrator v. Hawkins, (4 Bibb 390,) and are of opinion that there is enough in this devise, to show that the testator did not use the words, 'heirs of her body,' in the technical sense as embracing the whole line of her descendants in succession, but in the restricted and untechnical sense of denoting the individuals who might be the heirs of her body at the time of her death. We will not, on the presumption of a benefit intended to the daughter Fanny, or her heirs, upon the indefinite failure of the first line, however remote, give a construction to the clause contrary

And in Grimson *v.* Dowding, (*p*) where the testator devised "the said *estate*" to A for life with remainder "to the heirs of his body lawfully begotten forever equally, share and share alike, sons and daughters, but if A should die without heirs or heir" then over, Sir R. Kindersley, V. C., held that A took an estate tail.

Devise of "estate" to heirs of the body, "share and share alike."

Words of limitation and of modification combined.

Nor will words of limitation to the heirs general, in addition to words of inconsistent modification, avail to convert "heirs of the body" into words of purchase.

"Heirs male who shall live to attain twenty-one and his heirs."

Thus, in Toller *v.* Attwood, (*q*) there was a devise to the use of E., a married woman, for her separate use for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the heirs male of the body of E. to be begotten, *who shall live to attain the age of twenty-one years, and to his heirs and assigns forever;* but in default of such heirs male, or there being such, he or they should die before he or either of them should attain the age of twenty-one years without lawful issue, then over. It was held by the Court of Q. B. that the words, "who shall live," &c., could not restrict the force of the previous limitation, and that E. took an estate tail, citing the rule as distinctly and emphatically laid down in Jesson *v.* Doe, that technical words should have their legal effect unless from subsequent inconsistent words it was very clear that the testator meant otherwise; and in this case the form of the gift over rather favoring the conclusion of an estate tail in E., than of a limitation by purchase to her sons. The court did not advert to the form of the limitation being "to *his* heirs and assigns," as showing that one person only was intended to take at one time as heir of the body, and as strengthening the conclusion that "heirs of the body" must be held to be words of limitation in order to let in all the issue. (*r*)

The clause in Toller *v.* Attwood which required "heirs" to be of

to the natural meaning of the words, and by which all benefit of the devise is taken away, both from the heirs of the body of the first devisee and from those who were to have the remainder. And we remark, as affording some confirmation to the view we have taken, that the ultimate devise is not to the daughter Fanny and her heirs, but to her alone."

[(*p*) 4 Drew. 125. See also Anderson *v.* Anderson, 30 Beav. 209.

(*q*) 15 Q. B. 929. The trustees were held to take the fee, *ante* p. *294.

(*r*) See ch. XXXIX., § 2.

full age, (s) was no less inconsistent with a devolution by inheritance than one that would make them tenants in common. But actual decision is not wanting on a clause of the latter kind *in combination with superadded words of limitation. Thus, in Mills v. Seward, (t) where a testator devised his real estate to A for life without impeachment of waste, with remainder to the heirs of the body of A *habendum* to such heirs and his, her or their heirs and assigns forever as tenants in common; and if A should die under twenty-one, but should leave heirs of his body surviving, then to such heirs of A and his, her and their heirs and assigns forever in like manner; but in case A should die without leaving any such heirs of the body him surviving, then over. It was held by Sir W. P. Wood, V. C., that neither the words importing a tenancy in common nor the superadded words of limitation were sufficient to deprive the words "heirs of the body" of their proper meaning. It was argued that in the gift over on the death of A under twenty-one "heirs of his body" must mean children (since in that event he could not leave issue more remote), and that the same construction must be given to the words in the previous clause. But the V. C. said that the fact that children would be included among the heirs of the body did not make the phrase signify children exclusively. He therefore held that the rule in Shelley's Case applied, and that A was tenant in tail.]

"Heirs of the body and their heirs as tenants in common."

The preceding cases present many shades of difference, but they *all* concur in establishing the principle, that words of inconsistent modification engrafted on a limitation to heirs of the body are to be rejected. It follows, then, that every decision not strictly reconcilable with this principle may be regarded as overruled by them. How far the line of cases about to be stated falls under the remark, the reader will form his own opinion, keeping in view the general scope of the reasoning of Lord Eldon and Lord Redesdale in Jesson v. Wright, and their pointed reprobation of "petty distinctions."

Observations.

Cases in which expressions were held to control "heirs of the body."

(s) See similar modification in Jack v. Fetherstone, stated this ch. *ad fin.*

(t) 1 J. & H. 733. In Montgomery v. Montgomery, 3 Jo. & Lat. 55, Lord St. Leonards said, Doe v. Jesson only decided that "heirs of the body" should operate as words of limitation where otherwise the issue would not take estates of inheritance. But as to this Wood, V. C., observed that, in the case before Lord St. Leonards the word "issue" was used, and that (except Right v. Creber, 5 B. &

To "heirs male or female" forever.

In Doe d. Browne *v.* Holmes (*u*) the devise was to L. for life, with impeachment of waste, remainder unto the *heirs male or female* lawfully to be begotten of the body of L. forever, they *paying certain sums thereout. The court *inclined* to the opinion that this was not an estate tail in L., but a contingent remainder in fee to the issue; but it was unnecessary to decide the question, as a recovery had been suffered, which had either barred the entail, or destroyed the contingent remainder. This case seems to be destitute of even the slender grounds upon which the construction of an estate tail is commonly resisted in cases of this nature, nor did the court, it will be perceived, assume to decide the point.

"As well females as males, and to their heirs."

Another case which must be classed with this series is Doe d. Long *v.* Laming, (*x*) where a testator devised gavelkind lands to his niece *A and the heirs of her body* lawfully begotten or to be begotten, *as well females as males, and to their heirs and assigns forever, to be divided equally, share and share alike, as tenants in common.* A died in the testator's lifetime. Lord Mansfield said the devise could not take effect at all, but must be absolutely void unless the heirs took as purchasers; that the term *heirs* in the plural, in the case of gavelkind lands, answered to the term *heir* in the singular in the common case of lands not being gavelkind: that the testator mentioned females not only expressly and particularly, but even prior to males; and that it was clear that he did not mean that the lands should go in a course of descent in gavelkind. Influenced by these and other such considerations, the court held the true construction of the devise to be, that the children of A took estates in fee.

Remark on Doe *v.* Laming.

Few cases have been more cited than this. There being both words of limitation and words of distribution annexed to "*heirs of the body,*" it has been commonly relied upon as an authority for giving to both those circumstances occurring conjunctively the operation of changing heirs of the body into *children.* It is observable that the court had to encounter, not only the difficulty of doing this violence to the words, but also that of reading the limitation to the heirs as a *remainder;* for the devise was to A and the heirs of her body in one entire unbroken clause, and not to A for life, *re-*

C. 866, which he referred to a different ground) there was not a single decision to be found where the words "heirs of the body" had been read as words of purchase, on the single ground that they were followed by "and their heirs and assigns." See also per Kindersley, V. C., 4 Drew. 133.]

(*u*) 3 Wils. 237, 241, 2 W. Bl. 777.

(*x*) 2 Burr. 1100.

mainder to the heirs; and, therefore, even if the devise had been *expressly* to children, they must have taken jointly with their parent, or not at all; indeed so strongly is the impossibility of reading the devise to the children as a remainder felt in such cases, that where they cannot take jointly with their parent, on account of their non-existence when the *devise takes effect, the word *children* is, we shall see in the next chapter, actually construed as a word of limitation, in order to give the parent an estate tail which *may* devolve upon the children, this being, it is considered, the *only* means of preventing the total failure of the testator's intention in their favor. Such cases form a singular contrast to the construction adopted in Doe *v.* Laming.

Doe *v.* Laming virtually overruled by Doe *v.* Harvey.

As to the circumstance of the land being *gavelkind*, this extraordinary ground of distinction is overturned by Doe d. Bosnall *v.* Harvey, (*y*) which, it is observable, has *all* the ingredients that have been relied upon by the judges who decided or who have since cited Doe *v.* Laming, viz., the land being gavelkind; there being words to carry the fee to the children, if the devise had been construed as designating them; (*z*) and lastly, there being a direction that *females* should take as well as *males*, and the whole as tenants in common. We might then reasonably have hoped never to hear the case of Doe *v.* Laming again cited as an authority in a court of law. The circumstance that the devise would have lapsed if the devisee had taken an estate tail, seems to have had an undue influence on Lord Mansfield's mind, and the case may be regarded as one of those in which this distinguished judge suffered the established rules of construction to be violated in order to avoid hardship in the particular instance.

Remarks of Sir E. Sugden on Doe *v.* Laming.

[However, in Montgomery *v.* Montgomery (*a*) Sir E. Sugden, C., said that though Doe *v.* Laming had been sometimes questioned he thought it properly fell within the fourth exception mentioned by Blackstone, J., in his judgment

(*y*) 4 B. & Cr. 616, stated *ante* p. *369; [see accord. per Lord Brougham, 3 Cl. & Fin. 77.]

(*z*) In Doe *v.* Harvey, the word *estate*, used in the description of the subject-matter of the preceding devise, would clearly have extended to the devise in question. This makes Mr. Justice Bayley's observation, in regard to Doe *v.* Laming before adverted to, (*ante* p. *362,) the more extraordinary; for the alleged distinction with respect to the words of limitation occurring in that case was not only altogether untenable according to the doctrine of the authorities, but was not presented by the actual circumstances of the case.

[(*a*) 3 J. & Lat. 52.

in Perrin *v.* Blake; (*b*) namely, where the testator has superadded fresh limitations, and grafted other words of inheritance upon the heirs to whom he has given the estate. Blackstone, J., does indeed himself (*c*) class Doe *v.* Laming within his fourth exception, but he also classes it under his third exception, namely, where words of *explanation* are added to the words "heirs of the body;" and, at the time he wrote, this certainly (if any) was the only exception under which to class it, though that exception, so far as it depends on *such words as were used in Doe *v.* Laming, namely, "female as well as male, and to take as tenants in common," has, as we have seen, been expressly overruled by Jesson *v.* Wright; moreover, we have Lord Northington's authority, that in his time there was *no case in the books* where "heirs," used in the plural number with words of limitation added, had been held words of purchase. (*d*) It is impossible, therefore, to come to any other conclusion than that the cases did not, in Mr. Justice Blackstone's time, as they have not since, recognize his fourth exception as applying to cases where the word "heirs" in the plural number is used; that exception must be taken to apply solely to cases in which the word "heir" in the singular is used as in Archer's Case, (*e*) or where the line of descent is altered as in the case put by Anderson, C. J., in Shelley's Case; and this conclusion is abundantly confirmed (if confirmation is wanted) by Toller *v.* Attwood (*f*) and Mills *v.* Seward, (*g*) both decided since Montgomery *v.* Montgomery.

The case next in chronological order to Doe *v.* Laming is Doe d. Hallen *v.* Ironmonger, (*h*) which arose on a devise to A and his heirs, upon trust to receive the rents, *and apply the same* for the support of S. and the issue of her body lawfully begotten or to be begotten, *during the life of S.;* and after the decease of S., upon trust *for the use of the heirs of the body* of S. lawfully begotten or to be begotten, their heirs and assigns forever, *without any respect to be had or made in regard to seniority of age or priority of birth,* and in default of such issue over. S. had three children, one son and two daughters. The son died in her lifetime leaving several children, and his eldest son, on the death of S., claimed the property as the heir of her body at her death; but it was held that he was not entitled.

"Without any respect to seniority of age," &c.

(*b*) Harg. Law Tracts 506.
(*c*) See Ib.
(*d*) 1 Ed. 432.
(*e*) *Ante* p. *326.
(*f*) 15 Q. B. 929, *ante* p. *370.
(*g*) 1 J. & H. 733, *ante* p. *371.]
(*h*) 3 East 533.

By the few observations which fell from the court in the course of the argument, it appears that the judges relied upon the words, "without respect, &c., to seniority of age and priority of birth," as plainly showing that the heirs should take "as *purchasers*," meaning, it should seem, as *children*, for even as heirs of the body they were clearly *purchasers*, inasmuch as the limitation to the heirs and the limitation to the ancestor were of a different quality. (*i*) Perhaps it will be said that this circumstance distinguishes the case from those under consideration; *but it would be difficult to support such a distinction. The words "heirs of the body" are as clear and well ascertained in the one case as in the other, and therefore require a demonstration of intention equally clear and decisive to control them. The class of objects embraced by the two gifts is the same. Indeed the question whether the rule in Shelley's Case will or will not operate upon the two limitations, seems to be quite irrespective of the construction; (*k*) though it cannot be denied that a regard to the effect of the application of that rule, in making the ancestor tenant in tail and thereby enabling him to exclude all the ulterior objects by means of a disentailing assurance, has not unfrequently biassed the minds of judges in determining the construction.

Observations upon Doe v. Ironmonger.

The next case is Doe d. Strong *v.* Goff, (*l*) where the devise was to the testator's daughter M. and *to the heirs of her body* (*m*) lawfully begotten or to be begotten, *as tenants in common, and not as joint tenants;* but if such issue should depart this life *before he, she or they should respectively attain their age or ages of twenty-one years*, then over to the testator's son. It was held in K. B. that the daughter took an estate for life only, with remainder to her children as tenants in common. Lord Ellenborough considered that the heirs of the body being to take as *tenants in common* clearly demonstrated that children were meant by that description, as heirs of the body would take by succession, which he considered was rendered still more plain by the following words, "that if such issue should depart this life *before twenty-one;*" and he held that this was too plain to be defeated by a mere conjecture that the devisor might have a paramount intention inconsistent therewith; and, even admitting such intention, he

"As tenants in common, with devise over if the issue died under twenty-one."

Lord Ellenborough's judgment in Doe v. Goff.

(*i*) *Ante* p. *335.

[(*k*) See acc. per Kindersley, V. C., 4 Drew. 132; and *per cur.*, 15 Q. B. 955.]

(*l*) 11 East 668.

(*m*) This case is open to the same observations as Doe *v.* Laming, in regard to the circumstance of the limitation to the heirs not being by way of remainder.

thought it might afford a reason for implying cross remainders between the children (*n*) (which he observed it was not necessary to decide), but not for making so important a difference as converting into an estate in the mother what would otherwise be separate and distinct interests in the children. He ridiculed the idea that the eldest son and his issue should take, *to the exclusion of the rest, lest the share of a child dying under twenty-one should go over to the testator's son (*o*) before all the issue of the daughter were extinct. He observed that the court had looked through all the cases, and did not think they should break in upon any of them by this decision.

Of this case it is enough to say, that it has been distinctly overruled by the highest authority. (*p*)

Authority of Doe *v.* Goff denied in Jesson *v.* Wright.

Thus in Jesson *v.* Wright (*q*) Lord Redesdale said, "Doe *v.* Goff seems to be at variance with preceding cases. In several cases it had been clearly established that a devise to A for life, with a subsequent limitation to the heirs of his body, created an estate tail, and that subsequent words such as those contained in this will," (alluding, no doubt, to the words "share and share alike, as tenants in common," occurring in that case,) "had no operation to prevent the devisee from taking an estate tail. In Doe *v.* Goff there were no subsequent words, except the provision in case such issue should die under twenty-one, introducing the gift over. This seems to be so far from amounting to a declaration that he did *not* mean heirs of the body in the technical sense of the words, that I think they peculiarly show that he *did* so mean. They would otherwise be wholly insensible. If they did not take an estate tail, it was perfectly immaterial whether they died before or after twenty-one. They seem to indicate the testator's conception, that at twenty-one the children (*i. e.*, the issue) should have the power of alienation. *It is impossible to decide this case without holding that Doe* v. *Goff is not law.*"

(*n*) By cross remainders he must have meant cross executory limitations; for it is clear that the children, if they took at all, had *a fee* by implication from the gift over in the event of their dying under twenty-one, (*ante* p. *271,) on which fee of course no remainder could be limited; but it seems to be the better opinion, that in such cases no cross executory limitation in fee would be implied. See *post* ch. XLIII.

(*o*) But upon the terms of the devise, as settled by decision, it is clear that no share could go over to the son unless *all* the issue of the daughter died under twenty-one.

[(*p*) But see 3 J. & Lat. 54, where Sir E. Sugden seems to say Doe *v.* Goff is not overruled.]

(*q*) 2 Bligh 58, stated *ante* p. *365.

Lord Eldon expressed the same opinion, (r) tempered, however, with his characteristic caution. "Doe v. Goff," he said, "is difficult to reconcile with this case, I do not say impossible; but that case is as difficult to be reconciled with other cases."

Observations.

The deliberate denial by these eminent judges of the case of Doe v. Goff, may be considered as equivalent to an affirmative decision, that under such a devise an estate tail is created; in other words, that a devise to A and the heirs of his body as tenants in common, with a limitation over in case the issue or the heirs of the body should die under twenty-one, gives A an estate tail. Indeed such a devise over is not absolutely *inconsistent* with an estate tail, as the testator *may* intend (though *the intention is rather improbable) that the remainder shall be contingent on the event of the *issue* of the tenant in tail (not the tenant in tail himself) dying under age. But Lord Redesdale went a great length in asserting that these words *assisted* the construction which gave the ancestor an estate tail, for the absurdity which he seemed to think attached to the supposition that they were applied to children is quite removed by giving them, as the established rule does, the fee simple. Admitting, however, that the inference, so far as it goes, is the other way, it does not approach to that necessary irresistible kind of evidence, which alone should be allowed to vary the construction of words of an established signification.

"As tenants in common," with devise over if the issue died under twenty-one.

Another case, which perhaps it may be difficult to rescue from a similar condemnation, is Crump d. Woolley v. Norwood, (s) where a testator devised to his three nephews W., J. and R., equally between them during their respective lives as tenants in common; and after their respective decease he devised the share of him or them so dying *unto the heirs lawfully issuing of his and their body and bodies* respectively, and, if more than one, *equally to be divided* and to take *as tenants in common;* and, if but one, to such only one, and to his, her or their heirs and assigns forever, and if any of the testator's said nephews should die

(r) 2 Bligh 55.

Treatment of Crump v. Norwood in Lees v. Mosley.—(s) 7 Taunt. 362, 2 Marsh. 161. In Lees v. Mosley, 1 Y. & C. 595, the court lent no countenance to the attempt of counsel to uphold Crump v. Norwood and Doe v. Goff. Lees v. Mosley itself was decided mainly on the difference between the terms "heirs of the body" and "issue" in regard to the force of explanatory words. It therefore belongs not to the present chapter, but to ch. XXXIX., § 2, subs. 3.

without such issue, or, *leaving any such, they should all die without attaining twenty-one*, then he devised the part of him and them so dying unto the survivor and survivors, and the heirs of the body of such surviving and other nephew equally, as tenants in common, and to hold the same as he had therein-before directed as to the original share, and with the like contingency of survivorship on failure of issue; and in default of such issue of his said nephews, then over to the testator's own right heirs. It seems to have been rather taken for granted in this case (for the contrary was scarcely contended for), that the nephews took an estate for life only, with remainder in fee to their *children*. Gibbs, C. J., observed that he would state the interest which W. and his *children* took in the premises. "The devise," he said, "is to W. for life, and if he has children (*for heirs here mean children*),[4] then to them in fee; if he has no *children, then the estate goes to the testator's nephews J. and R. *It is admitted on all hands that this is the true construction.*" And the court held that the contingent remainder in W.'s share was destroyed by the descent of the reversion in fee on him at the decease of his father, to whom it devolved immediately from the testator. (*t*)

"*Heirs of the body*" assumed to mean *children*.

Remark on Crump v. Norwood.

This case was not cited in Jesson *v.* Wright, which accounts for its not having fallen under the censure there

4. Bunnell *v.* Evans, 26 Ohio St. 409; Carter *v.* Reddish, 32 Id. 1; Dunn *v.* Davis, 12 Ala. 135; Loving *v.* Hunter, 8 Yerg. 4. In Powell *v.* Glenn, 21 Ala. 458, 466, Dargan, C. J., said: "The words, 'heirs of the body' ordinarily are words of limitation, and not words of purchase; but they are frequently used in wills to denote 'children,' or as synonymous with 'children,' and when used in that sense by the testator, we must construe them as words of purchase, and not of limitation. And when, from other expressions in the will, we see that the estate of the first taker is restricted to a life estate, and the property devised by the terms of the will is to vest in the children of the first taker that may be then (at the death of the first taker) in life, we must then construe the words 'heirs of the body' as words of purchase and not of limitation. Any other rule of construction than this would violate the intention of the testator, or fail to carry that intention out when it would be lawful to do so. Indeed all authorities agree, that though the words, 'heirs of the body,' or 'dying without issue' do ordinarily create an estate tail, yet they may be restricted and explained by other expressions: and if, from such other expressions, we see that the testator intended that the estate of the first taker should cease with his life, and the property given should then vest in his children, or, in default of children at the time of his death, then over to another, in such case, we cannot refuse to give effect, to the remainder without violating the well settled rules of law."

(*t*) See Hartpoole *v.* Kent, T. Jones 76, 1 Vent. 396; Hooker *v.* Hooker, Lee's Cas. temp. Hardw. 13.

applied to Doe *v.* Goff, which it closely resembles, and on the authority of which, probably, the translation of heirs into children was considered as almost too clear for argument.

Devise over in default of issue *by the testator* following a devise to his wife in tail.

Gretton *v.* Haward (*u*) is another of the decisions which occurred during the time that Doe *v.* Goff was regarded as an authority. The devise was in these words:—"I give devise and bequeath unto my loving wife A all my real and personal estate, she paying debts," &c.; and after her decease to *the heirs of her body, share and share alike* if more than one, "and, in default of issue to be lawfully begotten *by me*, to be at her own disposal." Doe *v.* Goff was cited in argument, and the now exploded doctrine of that case, that the testator, having given the estate to the heirs of the body share and share alike, could not have intended an estate tail under which the eldest son would take the whole, was much relied on. The court certified (on a case from chancery), that the wife took an estate for life, with remainder to the *children* as tenants in common in fee; and this certificate was confirmed by Sir W. Grant, M. R. (*x*)

Observations upon Gretton *v.* Haward.

No remark fell from the court during the argument, so that the precise grounds of the decision are not known; but it has been sometimes considered as distinguished from the other cases by the circumstance, that the limitation over was in default of issue begotten *by the testator*, which must, it is said, have referred exclusively *to children*. This, however, is a *non sequitur;* for, allowing to these words their utmost operation, they are only explanatory of the species of heirs of the body intended by the testator in the preceding devise, namely, heirs by himself; (*y*) and the effect would then be to make the wife tenant in special tail, if she had issue by the testator, or while the possibility of her having issue continued; and in case she had no issue by *him, she would, from the time that such possibility ceased, be tenant in tail after possibility of issue extinct. (*z*)

General remarks upon the class of cases overruled by Jesson *v.* Wright.

Such is the long line of cases which appear to have been overturned by Jesson *v.* Wright; a decision which will be appreciated when the state in which the subject had been left by the prior adjudications is contemplated. The frequent demand upon the courts to pronounce on the construction

(*u*) 6 Taunt. 94, 2 Marsh. 9.
(*x*) 1 Mer. 448.
[(*y*) See accordingly cases cited *supra* p. *106, n. (*a*).]
(*z*) See Platt *v.* Powles, 2 Man. & Sel. 65.

of the words "heirs of the body," when associated with words of modification which did not exactly quadrate with an estate tail, evinces the uncertainty that prevailed in the profession in regard to the actual effect of such a devise. The slightest variation of phrase was thought to render a case proper for judicial investigation, in order to try the experiment whether these words, or the inconsistent modifying expressions, would be held to preponderate. The mischief, however, did not altogether *originate* in the class of cases just stated, but may be traced to an earlier source. It seems to have been a consequence of the line of argument adopted by Lord Kenyon in Doe d. Candler *v.* Smith, (*a*) and other cases, where, though a devise of the nature of those under consideration was held, and properly held, to confer an estate tail, this construction was founded, not on the uncontrolled effect of the words of limitation, but upon the *general intention* manifested by the words disposing of the property to the next taker, if the devisee in question died *without issue;* which, it was said, demonstrated that the estate was not to go over until a general failure of issue of such prior devisee. Having therefore first reasoned upon the devise to the heirs of the body or issue as a gift to *children* or to issue *of a particular class,* the court sacrificed the intention in favor of these objects, which was denominated the *particular* intent, in order to give effect to the "*general* intent," which was discerned in the subsequent words. Lord Ellenborough, the successor of Lord Kenyon, acceded to the reasoning, or, at all events, to the authorities, which read the devise to the heirs of the body and issue as a gift to *children;* but, probably seeing no reason why the devise so construed should be affected by the use of the same or nearly similar words in the clause introducing the devise over (which clearly referred to the objects of the preceding devise, whatever those objects were), held that the *children* were entitled, notwithstanding the subsequent words *referring to the failure of issue. This appears to be the short history of the rise and progress of the doctrine which the case of Jesson *v.* Wright overturned.

But the uncertainty induced by a series of erroneous decisions is not easily removed; and we shall see that the effect of inconsistent words of modification, engrafted on a devise to the heirs of the body, has been since repeatedly agitated.

Thus, in Wilcox *v.* Bellaers, (*b*) where the testator devised his lands

(*a*) 7 T. R. 531, *ante* p. *364. See also Robinson *v.* Robinson, 1 Burr. 38, *post.*

(*b*) Hayes' Inq., p. 2.

to his son H. during his natural life, and after his decease to *such* of his said son's *children*, and in such shares and proportions as his said son should, by his last will and testament duly executed, limit, direct and appoint, *and to their heirs*, and for want of such direction and appointment, and as to such part of the estate of which no such appointment should be made, to *the heirs of the body* of the said H., *their heirs and assigns forever;* and in case his said son should happen to die without issue, then *from and immediately after his decease* the testator devised the said estate unto his daughter E. for life, remainder to such of her children and in such shares as she should by deed or writing appoint, and to their heirs; and in default to the heirs of the body of the said E., their heirs and assigns forever; and in case his son should live, *and have children as aforesaid*, then he bequeathed unto his daughter E. a legacy of £500. H., before issue born, suffered a common recovery. To a title derived under this recovery, it was objected that H. was not tenant in tail, but that his children took by purchase. The vendor instituted a suit in equity to enforce the performance of the contract, and the master reported in favor of the title. The purchaser excepted to the report, and the exception was argued at the Rolls, (c) before Graham, B., and Master (afterwards C. B.) Alexander, and Master Stratford (sitting for the then M. R.), who, after taking time to examine the authorities, differed in opinion; the two former thinking it very doubtful at least whether H. took more than an estate for life, and Master Stratford being of a contrary opinion, so that no judgment was given. The exception was afterwards (d) argued before Sir T. Plumer, M. R., who, upon looking into the cases, thought there was so much doubt whether H. took an estate tail, that the purchaser ought not to be compelled to take the title, and accord*ingly dismissed the bill; and the Lord Chancellor (Lyndhurst), on appeal, affirmed the order. (e)

Limitation to *heirs of the body*, with power of appointment to *children*, &c.

The only circumstances affording the slightest pretext for distinguishing this case from Jesson *v.* Wright are,—first, the power to appoint to the *children*, secondly, the legacy to the devisee in remainder, in case H. "should live and have children as aforesaid," [and thirdly, the words of limitation superadded to the gift to the heirs of the body.]

Examination of the circumstances in which Wilcox *v.* Bellaers differs from Jesson *v.* Wright.

(c) June, 1823.
(d) 17 Dec., 1823.
(e) T. & R. 495.

As to the first point, we learn from Smith *v.* Death, (*f*) that there is no *necessary* implication, that the term "heirs of the body" in the limitation is used to describe the same objects as "children" in the power. As to the second, it will perhaps be said that the testator evidently intended the devisee in remainder to have the legacy if the objects of the prior devise came into existence, and which, therefore, is explanatory of those objects being children. But this is merely conjectural; the testator might intend the legacy to be a charge only as against the objects of the power, as distinguished from the objects of the limitation, because the donee might have appointed to those objects in fee to the total exclusion of even a chance of succession by the devisee in remainder. However this may be, the circumstance is far too equivocal to be made a ground for departing from the construction of words of an established meaning. [As to the third point, it has been repeatedly decided that a limitation to the heirs general superadded to a gift to "heirs of the body" will not convert the latter into words of purchase with the restricted sense of "children."]

Nor is Wilcox *v.* Bellaers the only instance in which reluctance has been manifested to follow up the principle of Jesson *v.* Wright; for in other cases the term *heirs of the body* has since been cut down to *children*, in subservience to expressions in the context which that case had appeared forever to have stripped of all controlling operation.

"Share and share alike," their heirs and assigns forever.

Thus, in Right d. Shortridge *v.* Creber, (*g*) where a testator devised a messuage to trustees and their heirs, in trust to permit his daughter J. and her assigns, to receive the rents for her life free from her husband, and after her death then the testator devised the same to *the heirs of the body* of J., share and share alike, their heirs and assigns forever, it was held *that the words "share and share alike" denoted that the testator meant by "heirs of the body" to designate children.

Remarks on Right *v.* Creber.

It is proper to observe that Jesson *v.* Wright, although decided several years before Right *v.* Creber, was not cited in the latter case, and the subsequent determination of the Court of Q. B. in Doe *v.* Featherstone, (*i*) already stated, shows

(*f*) 5 Mad. 371; stated *ante* vol. I., p. *552.

(*g*) 5 B. & Cr. 866.

(*i*) 1 B. & Ad. 944; *ante* p. *369. Right *v.* Creber was thought by Wood, V. C., to be reconcilable with Doe *v.* Jesson and Doe *v.* Featherstone, on the ground that the estate for life was equitable and the remainder legal, so that the rule in Shelley's Case did not apply, 1 J. & H. 737. But as to this *vide sup.* pp. *374, *375.

that a similar decision would not now be made. It is surprising, however, that in Doe *v.* Featherstone the case of Right *v.* Creber was referred to by Patterson, J., as not inconsistent with what the court was then about to decide; for the only distinction is, that in one case there were, and in the other there were not, superadded words of limitation, which were, we have seen, wholly immaterial, and on which, indeed, no stress was laid by the judges who decided Right *v.* Creber.

[It may be observed, in conclusion of this section, that a different construction will not necessarily be put upon limitations by way of trust expressed in words such as those now under consideration, merely because the trust is a trust to convey and not a direct trust.] (*k*)

No distinction made where there is a direction to convey.

III.—But it is not to be inferred from the preceding cases that the words *heirs of the body* are incapable of *explanation* by the effect of superadded expressions clearly demonstrating that the testator used those words in some other than their ordinary acceptation, and as descriptive of another class of objects. The rule established by those cases only requires a clear indication of intention to this effect. Where the words in question are accompanied by such an explanatory context, the devise is to be read as if the terms which they are explained to mean were actually inserted in the will.

Effect of clear words of explanation annexed to heirs of the body.

Accordingly, in Lowe or Lawe *v.* Davies, (*l*) where a testator devised to B and his heirs lawfully to be begotten, "that is to say, to his first, second, third, and every other son and sons successively, lawfully to be begotten of the body of the said B, and the heirs of the body of such first, second, &c., it was held that B took but an estate for life; for the subsequent clause was explanatory of what "heirs" meant.

Lowe *v.* Davies.

Heirs, "that is to say," &c.

*So, in Lisle *v.* Gray, (*m*) where real estate was [limited by deed to the use of E. for life, remainder] to the use of the first son of the body of E. and the heirs male of the body of such first son, and for default of such issue, to the use of the second son of the body of E. and the heirs male of the

Lisle *v.* Gray.

"Heirs male of the body," explained to mean sons.

[(*k*) Marryat *v.* Townley, 1 Ves. 102.]

(*l*) 2 Ld. Raym. 1561, 2 Stra. 849, 1 Barn. B. R. 238.

(*m*) 2 Lev. 223, T. Jo. 114, T. Ray. 278, 315 [affirmed in Ex. Ch., Pollex. 591, 1 P. W. 90, 2 Burr. 1109, not, as erroneously stated in Jo. & Ray., reversed;] see also Hayes' Inq. 81.

body of such second son (similar limitations were carried on to the fourth son), "and so to all and every other the *heirs male of the body* of E. respectively and successively, and to the heirs male of their body, according to seniority of age." There was a power to raise portions out of the land if E. died without issue male. It was held that E. took only an estate for life; the words "and so," &c., showing that the words "heirs male" in the latter clause meant *sons*, by relation to the preceding limitation.

Goodtitle v. Herring.

Same construction.

Again, in Goodtitle d. Sweet *v.* Herring, (*n*) where the devise was to A for life, remainder to trustees to preserve contingent remainders, remainder to the *heirs male* of the body of A to be begotten severally, successively, and in remainder one after another, as they and every of them should be in seniority of age and priority of birth, *the elder of such sons* and the heirs male of his body lawfully issuing, being always to be preferred to *the younger of such sons* and the heirs male of his and their body and bodies; and for default of such issue, to the *daughters*, as tenants in common, and the heirs of their bodies. The court held that the testatrix had, by the words "the elder of *such sons*," &c., explained herself by "heirs of the body" to mean *sons*, so that A took only an estate for life.

North v. Martin.

"Heirs of body" held to mean children.

So, in North *v.* Martin, (*o*) where by a marriage settlement lands were conveyed to the use of A the intended husband for life, with remainder to trustees to preserve contingent remainders, with remainder to B the intended wife for life, and after the decease of the survivor, to the use of the heirs of the body of A on the body of B to be begotten and their heirs, and if more children than one, equally to be divided among them, to take as tenants in common, and in default of such issue, then over. It was contended that, according to the authorities, particularly Wright *v.* Jesson, A was tenant in tail by force of the limitation to the heirs of his body; but Sir L. Shadwell, V. C., *held that the words "and if more children than one," were interpretative of those words, observing that no case had been cited, nor did he recollect any in which the words "heirs of the body" had been held to create an estate tail, where those words of interpretation had been used; and he

(*n*) 1 East 264 [affirmed in D. P., see 3 B. & P. 628;] see also Mandeville *v.* Lackey, 3 Ridg. P. C. 352, *post*. As to the expression heirs male *now living*, see Burchett *v.* Durdant, 2 Vent. 311, Carth. 154, *ante* vol. I., p. *319. For some other instances of the same kind, *ante* p. *72.

(*o*) 6 Sim. 266.

added (and the remark is deserving of attention), that this did away with the effect of the argument founded on the limitation over for default of such issue, which must be construed for default of such children.

Doe v. Woodall.

Heirs of body "in manner aforesaid," explained by preceding limitations.

[Again, in Doe d. Woodall *v.* Woodall (*p*) there was a devise to the testator's four grandchildren for their lives as tenants in common, with remainder as to the share of which each was tenant for life to his or her first and other sons successively in tail, with remainder to his or her daughters as tenants in common in tail, with cross remainders in tail between the daughters; and then the testator proceeded, "in case either of my said grandchildren shall happen to die leaving no issue behind him, her or them, then my will and meaning is that all and singular the premises herein lastly devised shall go and remain to the survivor of them and the heirs of his or her body lawfully to be begotten *in manner aforesaid.*" It was contended that, under the last clause, a surviving grandchild took an estate tail in the share of a grandchild who left no issue; but the Court of C. B. held that the limitation to the "heirs of his or her body" was explained by the words "in manner aforesaid" to mean a limitation to the first and other sons successively in tail, with remainder to the daughters as tenants in common in tail, as in the preceding limitations, and that the surviving grandchild therefore took only an estate for life.

Gummoe v. Howes.

Heirs of the body explained to mean children.

In Gummoe *v.* Howes, (*q*) the devise was upon trust for A and B equally for life, and in case of the death of either of them without issue, the part or share of her so dying to go to the survivor of them, but if either of them should depart this life leaving issue, then the part or share of her so dying to go to her children in equal proportions if more than one, and if but one, then to such only *child;* and after the death of both A and B, the testator directed his trustees to convey, assign and transfer the property to the heirs of the body of A and B lawfully begotten, share and share alike, or to the survivor or survivors of them if more than one, and if but one, then to such only *child* *when and as often as he, she or they should attain his, her or their respective age or ages of twenty-one years; and the will contained a devise over on the death of A and B without issue. Sir J. Romilly,

[(*p*) 3 C. B. 349; and see Green *v.* Green, 3 De G. & S. 480.

(*q*) 23 Beav. 184.

M. R., held that the words "heirs of the body" were interpreted to mean "children," and that A and B took estates for life only.

Jordan v. Adams.

Heirs male of the body held to mean sons, by mention of "their father."

And in Jordan v. Adams, (r) where a testator devised lands to W. T. for life, and after his decease "to the heirs male of his body for their several lives in succession according to their respective seniorities, or in such parts, shares and proportions, manner and form and amongst them as the said W. T. *their father* should appoint. And in default of such issue male of W. T.," over. It was held by the Court of C. B. that the testator had here shown that by heirs male of the body he meant sons, for in case of an appointment the appointor must stand in the relation of "father" to the appointees. In delivering the judgment of the court, Erle, C. J., allowed greater weight than was warranted by Jesson v. Wright to the words of modification contained in the devise: but Williams, J., declared his concurrence with the rest solely on the ground of the use of the words "their father." On appeal to the Exch. Ch. that court was equally divided: and the two judges who agreed with the decision below did so only on the ground taken by Williams, J.; Cockburn, C. J., one of them, declaring that the authorities forbade them to ascribe to the words of modification the effect claimed for them.]

Remark on preceding cases.

In all the preceding cases it will be seen that the testator had annexed to the term "heirs of the body" words of explanation, which [were held to prove that he had] used the expression as synonymous with *sons*. These cases, therefore, may be supported, without impugning the general principle, as stated by Lord Alvanley in Poole v. Poole, (s) that the courts will not deviate from the rule which gives an estate tail to the first taker if the will contains a limitation to the heirs of his body, except where the intent of the testator *appears so plainly to the contrary that nobody can misunderstand it;* for the will in these cases seemed to supply the clear incontrovertible evidence of intention required by such a statement of the doctrine.

(r) 6 C. B. (N. S.) 748, 9 Id. 483. It is remarkable that no reference was made to Shaw v. Weigh, 2 Str. 798. (stated ch. XXXIX., § 2,) where, notwithstanding the word "mother" occurring in similar relation to "*issue*," the latter word was held a word of limitation.]

(s) 3 B. & P. 627. There is a striking similarity between the general scope of Lord Alvanley's reasoning here and that of Lords Eldon and Redesdale in Jesson v. Wright, *ante* p. *366, *et seq.*

*On the other hand, in Jones *v.* Morgan, (*t*) it was decided, and that in perfect consistency with the principle of the cases just stated, that a devise to W. for life, without impeachment of waste, and after his decease to the use of the heirs male of the body of W. lawfully begotten, *severally, respectively, and in remainder, the one after the other, as they and every of them shall be in seniority of age and priority of birth*, gave W. an estate tail. Lord Thurlow said, "Where the estate is so given that it is to go to every person who can claim as heir to the first taker, the word *heirs* must be a word of limitation. All heirs taking *as heirs* must take by descent."

Heirs male of the body, "severally, respectively, and in remainder, the one after the other."

So, in Poole *v.* Poole, (*u*) where a testator devised all his real estate to the use of trustees, in trust for his first son during his life, and also upon trust to preserve contingent remainders, and after his decease in trust for the several *heirs male of such son lawfully issuing*, so that the elder of *such sons* and the heirs male of his body should always take before the younger and the heirs male of his body, remainder to the second, third, fourth, and other son and sons of the testator for their respective lives, and also upon trust to preserve, remainder in trust for the several heirs male of their bodies lawfully issuing, so as the elder of such sons and the heirs male of his body should take before the younger of such sons and the heirs male of his body, remainder to his first and every other daughter for their lives, and upon trust to preserve, remainder to the several heirs male of their respective bodies, so that the elder of such daughters and the heirs male of her body should always be preferred to the younger of such daughters and the heirs male of her and their body and bodies. The testator then charged the estates with certain portions, and devised them, in failure of such issue by him as aforesaid, but not otherwise, upon trust for his nephew A for life, and upon trust to preserve, remainder in trust for the first and other son and sons of A, as they should be in seniority of age and priority of birth, and the several heirs of their respective bodies lawfully issuing, so that the eldest of such sons and the heirs of his body should be preferred to the younger of the same sons and the heirs of his and their body and bodies. The question was, whether the eldest son of the testator took an estate for life or in tail; in other words, whether the testator had not explained himself by *the words "heirs male of the

"Such sons" construed such *heirs male* upon the effect of the whole will.

(*t*) 1 B. C. C. 206.

(*u*) 3 B. & P. 620.

body" in that devise to mean *sons*, by declaring that the elder of "*such sons*" should be preferred to the younger. Lord Alvanley and the rest of the Court of C. P., expressly avoiding an intimation of what their opinion would have been if that clause had stood alone in the will, held that, in connection with the devise to the other sons, the daughters, and the nephew, the son took an estate tail.

Remarks upon Poole v. Poole.

In this case the context certainly much assisted the construction adopted by the court, for as the other sons of the testator, as well as his daughters, took successive estates tail, it was scarcely supposable that he could intend the first son to have only an estate for life. To have made such a difference between the sons would have violated the general plan of the will. The clause which gave rise to the question, although applied properly enough in a subsequent part of the will to the devise to the other sons of the testator, was redundant in the position which it here occupied, where its insertion was evidently an error.

To W. and to his heirs male, the elder son surviving and the heirs male of his body always to be preferred, &c.

Again, in Jack *v.* Fetherstone, (*x*) where the words of devise were: —"I give, &c., to W. and to his heirs male, according to their seniority in age, on their respectively attaining the age of twenty-one years, all my estates real and personal in lands houses and tenements not hereinbefore disposed of, *the elder son surviving of the said W. and the heirs male of his body lawfully begotten always to be preferred to the second or younger son;* and in case of the failure of issue male in the said W. surviving him, or their dying unmarried and without lawful issue male attaining the age of twenty-one years, then to T. (brother of the said W.) and his heirs male lawfully begotten on attaining the age of twenty-one years, the elder to be preferred to the younger; and in case of the death or failure of the issue male of the said T. lawfully begotten, and their not attaining the age of twenty-one years, then to my right heirs forever." The House of Lords held that W. took an estate tail male. Tindal, C. J., declared the unanimous opinion of the judges to be, that the present case was governed by the rule laid down by Lord Alvanley in Poole *v.* Poole, "that the first taker shall be held to have an estate tail where the devise to him is followed by a limitation to him and the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it." Here the subsequent words were not wholly

(*x*) 9 Bligh 237 [3 Cl. & Fin. 67, (Fetherston *v.* Fetherston,) Sug. Law of Prop. 254.]

incom*patible with an estate tail. If W. took an estate tail, the elder son surviving, and the heirs male of his body would be preferred to the second or the younger son, and any difficulty created by the words referring to the majority of the devisees occurred equally whether the estate tail was in W. or in his sons.

By contrasting Lowe *v.* Davies and Lisle *v.* Gray with Jones *v.* Morgan, and Goodtitle *v.* Herring with Poole *v.* Poole and Jack *v.* Fetherstone, the limits of the doctrine of the respective cases will be perceived.[5]

5. A devise to A *for life*, with remainder to the heirs of her body *after her decease*, has been held not to be within the rule in Shelley's Case, Webster *v.* Cooper, 14 How. (U. S.) 488; so by statute of New York, Moore *v.* Littel, 41 N. Y. 66; so Powell *v.* Glenn, 21 Ala. 458; so to A for life, and "*after his death* to his heirs," Feltman *v.* Butts, 8 Bush 115; or "*at his death* to his heirs," (by statute abolishing the rule,) Putnam *v.* Gleason, 99 Mass. 454; or "*then* to his heirs forever," Turman *v.* White, 14 B. Mon. 560; or "*then* to the lawfully begotten heirs of his body," Loving *v.* Hunter, 8 Yerg. 4; or "then to his heirs after him for their sole right," Pratt *v.* Leadbetter, 38 Me. 9.

And a devise to A during his natural life, and "after his death to his issue, their heirs and assigns forever," is not within the rule in Shelley's Case in Delaware, Daniel *v.* Whartenby, 17 Wall. 639; but see Kingsland *v.* Rapelye, 3 Edw. 1; or "after his death to his issue in tail," Lyles *v.* Digges, 6 Harr. & J. 364; or as tenants in common, Cushney *v.* Henry, 4 Paige 345; or to his "heirs or issue lawfully begotten on the body of B, their heirs and assigns as tenants in common," Nebinger *v.* Upp, 13 Serg. & R. 68; or to "his issue and their heirs as tenants in common," Tongue *v.* Nutwell, 13 Md. 415; or to his "issue and their heirs forever in the proportions to which they would be entitled under the intestate laws," Robins *v.* Quinliven, 79 Penna. St. 333; or *issue* simply, with devise over if he leave none, Goldsborough *v.* Martin, 41 Md. 488; but see, *contra*, Kleppner *v.* Laverty, 70 Penna. St. 70; or "*issue* at his death in fee tail," Chelton *v.* Henderson, 9 Gill 432; or "at his death to his lawful issue forever," Hancock *v.* Butler, 21 Tex. 804; Myers *v.* Anderson, 1 Strobh. Eq. 346. But a devise to children, share and share alike, for life, and at death of any one his share "to his *issue* share and share alike" for life, "as far as may be allowed by statute," creates an estate tail, Gibson *v.* McNeeley, 11 Ohio St. 131; but see Gibson *v.* Moulton, 2 Disn. (O.) 158; and so, too, a devise to A for life, with remainder, in default of appointment, "*to his issue*," Kay *v.* Scates, 37 Penna. St. 31; or to his issue, and in default of issue, over, James' Claim, 1 Dall. 47.

A devise to A and B "during their natural lives and at their deaths the title is to vest in their heirs in fee forever," gives the heirs an estate by purchase, the rule in Shelley's Case being done away in Kentucky, Williamson *v.* Williamson, 18 B. Mon. 329.

Where a devise is to A "during her natural life and *at her death* to her *children* lawfully begotten," but the land "is given her only during her natural life and then *to descend* to her children lawfully begotten, their heirs and assigns forever," A takes a life estate only, Wight *v.* Baury, 7 Cush. 109; so in a devise to A for life, "reversible after her death to her children," McKee *v.* McKinley, 33 Penna. St. 92; so in a devise to A for life, "and

In further confirmation of the doctrine that the words "heirs of the body" are not controlled by expressions of an equivocal import, may be cited the case of Douglas *v.* Congreve, (*y*) where a testator devised real estate to A for life, and after his decease to the *heirs of his body*, and so on to several other persons by way of remainder in like manner, and then declared that all the aforesaid limitations were intended by him to be *in strict settlement*, with remainder to his own right heirs forever; and the Court of C. P. certified that these ambiguous words did not prevent the devisees from taking estates tail under the prior words of devise; which certificate was afterwards confirmed by Lord Langdale,

Declaration that devise to heirs of the body was intended to be *in strict settlement.*

then to his heirs," children appearing by the context to be intended by the word "heirs," Bunnell *v.* Evans, 26 Ohio St. 409; Reddish *v.* Carter, 1 C. S. C. R. (Ohio) 283; S. C., 32 Ohio St. 1; so "to her heirs or children," Dunn *v.* Davis, 12 Ala. 137; or to A and her heirs forever, "to be handed down to her children in fee simple as tenants in common, she only to enjoy the income during her life," Ellet *v.* Paxson, 2 Watts & S. 418. So a devise to "the heirs of the body of A, she to have the use and benefit during her life," children being intended by "heirs of the body," Roberts *v.* Ogbourne, 37 Ala. 175. So to A and his heirs, to "remain free for his children or heirs," Urich *v.* Merkel, 81 Penna. St. 332. So a devise to A for life, "and to the children of his body lawfully begotten after his decease," *habendum* "to A and the heirs of his body," Rogers *v.* Rogers, 3 Wend. 503. So a devise to A for life, and "after his death to his children lawfully begotten share and share alike," Miller *v.* Lynn, 7 Penna. St. 443; Gernet *v.* Lynn, 31 Id. 94; or to his "children, their heirs, &c.," Chew's Appeal, 37 Penna. St. 23. See, *contra*, Williams *v.* Leech, 28 Id. 89, overruled in Guthrie's Appeal, 37 Id. 22.

A limitation over "*at*" the first taker's "death leaving no lawful issue," takes effect as an executory devise, and the first taker has a conditional fee and not an estate tail, Moore *v.* Howe, 4 Mon. 199. Or a devise to A for life, with remainder to "her male heir B" if then living, "his heirs, &c.," and if not living to her next male heir, Dunwoodie *v.* Reed, 3 Serg. & R. 435. So a devise in trust for a daughter "and her heirs born and to be born," was held to give an estate by purchase to the heirs, Woodruff *v.* Woodruff, 32 Ga. 358; or to a daughter "and her future heirs of her body," Templeton *v.* Walker, 3 Rich. Eq. 543; so to a son "and his heirs," a codicil mentioning the son's subsequent death, Davis *v.* Taul, 6 Dana 52; or "to my wife and my heir equally, if she have a living heir," if not, all shall belong to her, Cleveland *v.* Spilman, 25 Ind. 95; so to A "and the heirs of her body by B," Jarvis *v.* Quigley, 10 B. Mon. 104.

A devise to A and B "and their heirs" gave an estate by purchase to the heirs, the intention appearing in other parts of the will, Adie *v.* Cornwell, 3 Mon. 276; so to A, B and C "and the heirs of their bodies respectively," with a limitation over on the death of either without issue, to "the survivors and the heirs of their bodies respectively," and A having died in the testator's lifetime, the heirs of his body take by purchase, Wheeler *v.* Allen, 54 Me. 232.

(*y*) 5 Scott 223, 4 Bing. N. C. 1, 1 Beav. 59.

M. R., who observed, "In the present case there is no executory trust. It is a case of direct devise of the legal estate, and in terms which, according to the rule of law, give an estate tail to the plaintiff; and it does not appear to me that the words 'in strict settlement' can have the legal effect of altering that estate. An executory trust would have admitted greater latitude of interpretation, and the effect of the words might have been different."

*CHAPTER XXXVIII.

"CHILDREN," "CHILD," "SON," "DAUGHTER," WHERE WORDS OF LIMITATION.

I. *Rule in Wild's Case.*
II. *"Child," "Son," "Daughter," &c., where used as* nomina collectiva.

Children where a word of limitation.

Rule in Wild's Case.

1. When no child at the time of the devise.

I.—The rule of construction commonly referred to as the doctrine of Wild's Case (*a*) is this, that where lands are devised to a person *and his children, and he has no child at the time of the devise,* the parent takes an estate tail; for it is said, "the intent of the devisor is manifest and certain that the children (or issues) should take, and as immediate devisees they cannot take, because they are not *in rerum natura,* and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore such words shall be taken as words of limitation."[1] In sup-

(*a*) 6 Rep. 17; S. C., Anon., Gouldsb. 139, pl. 47; S. C., *nom.* Richardson *v.* Yardley, Moore 397, pl. 519. [The words of the rule are "children or issue." But as to "issue" see ch. XXXIX. The rule (which is not stated in Gouldsb. or Moore) is distinct from the point *decided* in Wild's Case, which arose on a devise to A and his wife, and after their decease to their children. And see Doe d. Tooley *v.* Gunniss, 4 Taunt. 313; Doe d. Liversage *v.* Vaughan, 5 B. & Ald. 464; Beauchant *v.* Usticke, W. N. 1880, p. 14.]

1. Moon *v.* Stone, 19 Gratt. 130; Beacroft *v.* Strawn, 67 Ill. 28, 33; Matter of Sanders, 4 Paige 293; Rogers *v.* Rogers, 3 Wend. 503; Chrystie *v.* Phyfe, 19 N. Y. 344; Baker *v.* Scott, 62 Ill. 86; Reeder *v.* Spearman, 6 Rich. Eq. 88; Johnson *v.* Johnson, McMullan Eq. 345; Moore *v.* Leach, 5 Jones L. 88; Guthrie's Appeal, 37 Penna. St. 9, 21; Jones *v.* Jones, 2 Beas. 236; Carr *v.* Estill, 16 B. Mon. 309; McCroan *v.* Pope, 17 Ala. 612; Nimmo *v.* Stewart, 21 Id. 682; Vanzant *v.* Morris, 25 Id. 285; Akers *v.* Akers, 8 C. E. Gr. (N. J.) 26; Nightingale *v.* Burrell, 15 Pick. 104.

In Guthrie's Appeal, 37 Penna. St. 9, 15, Strong, J., says: "But children, in *law, is as certainly held to be a word of purchase as 'heirs of the body' are to be words of limitation. If there be so much difficulty in converting 'heirs of the body' into words of personal description, at least equal difficulties must surround the attempt to elevate the word children into a word of limitation. It in itself ascertains only the objects of the grant or devise, not at all the nature or extent of the es-

port of this position, a case is referred to, as reported by Serjeant Bendloes, (*b*) in which the devise was to husband and wife, "and to the men children of their bodies begotten," and it did not appear that they had any issue male at the time of the devise, and therefore it was adjudged that they had an *estate tail* to them and the heirs male of their bodies. The principle has been followed in several subsequent cases.

To A and *his child or children* forever.

Thus, in Davie *v.* Stevens, (*c*) where a testator devised to his son S, when he should accomplish the full age of twenty-one years, the fee simple and inheritance of Lower Shelstone, *to him and his child or children* forever, but if he should

tate given. These must be sought elsewhere. It is worthy of notice, that among the eighty-two cases contained in the tables of Mr. Hayes, there is not one in which a devise of the remainder to children was held within the scope of the rule in Shelley's Case, and to vest an estate in tail in the ancestor, to whom a *freehold* for life was limited by the same will or conveyance. In every case in which an estate tail was held to have thus vested, the author of the gift had made use of the words 'heirs of the body' or 'issue,' which latter is a word of doubtful meaning, though generally a word of limitation in a will; and if he used the word 'son' he used also in explanation of it, and as its synonym the word 'issue.' In most of the cases where the word son was used, the tenancy in tail of the ancestor was implied, not from that word, but from a devise over '*on failure of issue.*' It is not denied, that the word children may be used by a testator as a *nomen collectivum*, signifying 'heirs of the body,' but I have found no case in which it has been held to have been so used, unless the testator has also employed the words 'heirs of the body,' or 'issue,' as descriptive of the same objects. Nothing less appears to be sufficient to repel the presumption that the testator did not intend a limitation by the use of this word of purchase." Again, in Chrystie *v.* Phyfe, 19 N. Y. 344, 354, it was said by Strong, J.: "There is one class of cases, and one only, in which the term 'children' is considered as a word of limitation; that is, where there is a present devise to one and his children, when he has no children at the time. There if the word 'children' should be interpreted as a word of purchase, future children could not take at all, and in order that the will of the testator may operate favorably to them and not confine the gift to the parent for life, 'children' is then deemed a word of limitation. There are other cases, however, in which it has been held that a devise to one and her heirs, 'say children,' gave her a life estate only, with remainder to the children. Jarman, in his addition to Powell on Devises (vol. 2, 502,) says that where there is a devise to A and his wife, and after their death to their children, it is now admitted, on all hands, that it gives an estate for life to the parents, with remainder to the children for life."

(*b*) 1 Bulstr. 219, Bendl. 30.

(*c*) Dougl. 321. Wharton *v.* Gresham, 2 W. Bl. 1083, is generally classed with these cases; but as the devise was to J. W. and his sons *in tail male*, it is clear that he took an estate tail without construing "sons" as a word of limitation; and the only consequence of the non-existence of a son was his exclusion from taking immediately under the devise.

happen to die *before twenty-one, then over to testator's wife forever. S was unmarried at the death of the testator, and it was held that he took an estate tail, *there being no children to take an immediate estate by purchase.* The meaning, Lord Mansfield said, was the same as if the expression had been "to S. and his heirs, that is to say, his children or his issue." The word "forever" made no difference, for the heirs (of the body) of S. might last forever. (*d*)

To J. *and his children* lawfully to be begotten.

So, in Seale *v.* Barter, (*e*) where the devise was in these words, "It is my will that all my lands and estates shall after my decease come to my son J. *and his children* lawfully to be begotten, with full power for him to settle the same or any part or parts thereof by will or otherwise on them or any of them as he shall think proper, and for default of such issue, then" over in like manner to a daughter. J. had no child at the date of the will, [but had a daughter living at the testator's death.] (*f*) The Court of C. P., on the authority of Wild's Case, Wharton *v.* Gresham, and

Observations upon Hodges v. Middleton. — (*d*) In Hodges *v.* Middleton, Dougl. 431, Lord Mansfield and the Court of K. B. inclined to think that where a testator devised to A for life, and after her death to *her children*, upon condition that she or they constantly paid £30 a year for a clergyman to officiate in her chapel, and on failure thereof to testator's own next heirs, and in case of failure of children of A, then to her brother G., &c., A had an estate tail; or that if she took an estate for life, the children took an estate tail; and as recoveries had been suffered by both, the alternative of these propositions was not material. As the limitation to children in this case was by way of remainder, there seems to have been no ground, whether a child existed at the date of the will or not, for holding the parent to be tenant in tail. It is as difficult to perceive any satisfactory reason for giving the children estates tail. The direction to pay the £30 a year would have enlarged their devise to a fee simple. See *sup.* p. *270.

(*e*) 2 B. & P. 485; but see Doe d. Davy *v.* Burnsall, 6 T. R. 30; S. C., *nom.* Burnsall *v.* Davy, 1 B. & P. 215; Doe d. Gilman *v.* Elvey, 4 East 313, *post*, where it seems to have been taken for granted that under a devise to A and his issue [where the issue were tenants in common in fee,] the issue took by way of remainder; and it is observable that in Heron *v.* Stokes, 2 D. & War. 107, Sir E. Sugden suggested that the more natural construction of a gift to one and his children, *there being no children* in esse *at the time*, and that which he should have adopted in the absence of authority the other way, would be to hold it to be a gift to the parent for life, with remainder to the children. These remarks do not show that he considered that the authorities would have left him free to adopt such a construction if the point had called for decision. He would doubtless have felt himself bound to follow, in regard to real estate, the often-recognized rule in Wild's Case, either with or without the modification suggested. With respect to personalty, [slight circumstances have been held sufficient to warrant his construction. *Vide post* p. *398.]

(*f*) See 2 B. & P. 487.

several other cases (which the writer has referred to other grounds, as they did not involve the inquiry whether the devisee had children or not at the time,) held that J. took an estate tail, Lord Alvanley, C. J., expressly intimating that the court gave no opinion as to what would have been the *construction if there had been children born at the time of the devise.

Devise in remainder to B and to his children lawfully begotten forever.

Again, in Broadhurst *v.* Morris, (*g*) where the testator devised all his share of his two estates in W. to his daughter E. for life, and at her decease to F., her husband, during his life; and at the decease of his said son-in-law F. he directed that the whole legacy to him should go to his (testator's) grandson B. *and to his children lawfully begotten forever;* but in default of such issue *at his* (*B.'s*) *decease* to G. and his heirs. B. was unmarried at the death of the testator. It was contended that the words "at his decease" distinguished the present case from the previous authorities; and it was also suggested that by the effect of the word "forever" the children might take the fee; but the Court of K. B. certified (the case being from chancery) that the devise conferred an estate tail on B.

Thus, the cases have established, it should seem, that a devise to a man and his children, he having none at the time of the devise, gives him an estate tail.

Suggested modification of the terms of the rule.

The time of the devise appears to denote rather the period of the *making* of the will, than the time of its *taking effect*, (*h*) and yet it is impossible not to see that the material period in regard to the evident design of the rule is the death of the testator, when the will takes effect.

The object of the rule manifestly is, that the testator's intention in favor of children shall not *in any event* be frustrated; but if it be applied only in case of there being no child living at the time of the making of the will, the accident intended to be so carefully guarded against may occur. For suppose there should happen to be a child or children at that time, who should subsequently die in the testator's lifetime, so that no child was living at his death; in this case, though there was no child to take jointly with the parent, yet the rule would not be applied in favor of after-born children. On the other hand, in the converse case, namely, that of there being a child at the death, but

(*g*) 2 B. & Ad. 1. [See also Clifford *v.* Koe, W. N. 1880, p. 93.

(*h*) See acc. Seale *v.* Barter, stated above; and per Malins, V. C., Grieve *v.* Grieve, 36 L. J., Ch. 932.]

not at the date of the will, an estate tail would be created, though there was a child competent to take by purchase, so that the ground upon which that construction has been resorted to did not exist. Indeed a still more absurd consequence may follow from an adherence to the literal terms of this rule of *construction in the latter case; for suppose there is no child at the making of the will, but a child subsequently comes into existence, who survives the testator, and the parent does not, the devise would fail altogether, notwithstanding the existence of a child at the death of the testator, if it were held that the parent would have been tenant in tail. (*i*) These circumstances actually occurred in Buffar *v.* Bradford, (*j*) where a testator in a certain event gave real and personal estate to A *and the children born of her body.* (*k*) A having died in the testator's lifetime, leaving a child who was born after the making of the will, *when A had no child,* it was contended on the authority of Wild's Case that the devise had lapsed; but Lord Hardwicke held the child to be entitled. He said, "It must be allowed that children in their natural import are words of purchase and not of limitation, unless it is to comply with the intention of the testator, *where the words cannot take effect in any other way.*"

Application of the rule to future devises.

If the literal terms of the rule in Wild's Case can be departed from in the manner suggested, in order to give effect to its spirit, it would seem to follow that the parent would never be held to take an estate tail if there were a child, who, according to the established rules of construction, could have taken jointly with the parent. Consequently, if the devise were future, so that all children coming *in esse* before the period of vesting in possession would be entitled, (*l*) the rule which makes the parent tenant in tail would (if at all) only come into operation in the absence of any *such objects.* In Broadhurst *v.* Morris, (*m*) the rule seems to have been applied to a devise of this description, but this peculiarity in the case does not appear to have attracted attention, and it must be confessed that, in reference to cases of every class, the modification of the doctrine suggested in the preceding remarks has to encounter the objection,

(*i*) But now see 1 Vict., c. 26, § 32, *ante* vol. I., p. *352.

(*j*) 2 Atk. 220.

(*k*) In some of the early cases an absurd distinction is taken between a gift to children and a gift to children *of the body,* as if the latter more strongly pointed to an estate tail. Even Lord Hale seriously advanced it in King *v.* Melling, 1 Vent. 230. This is indeed "spelling a will out by little hints." See same judgment, 230.

(*l*) *Ante* p. *156.

(*m*) *Ante* p. *391; [and see Scott *v.* Scott, 15 Sim. 47.

that it makes the construction of the devise depend upon subsequent events, and therefore its adoption is not too hastily to be assumed.

[Lord Hardwicke's decision in Buffar *v.* Bradford is not to be understood as depending on any such modification of the rule. He refused to apply the rule in that case, because the context showed that it would disappoint the intention. The gift was to *the testator's sister during her widowhood; then the property was to be valued and divided into eight parts, four of which the testator gave to A and the children born of her body; but if any part should be thought too highly valued, "such part shall, *when the time of possession comes*, go to A and her children, because *they* will have *then* four of the eight parts." Lord Hardwicke said, "It is the time of possession in the present case which takes it out of the reasoning in Wild's Case; for here A and her children are to have four-eighths, and are to take at the same time as joint tenants. * * * * The child, being born in the lifetime of the testator, would have taken with his mother as joint tenants, if she had lived; as she is dead he *shall take the whole* by way of remainder." This, as pointed out by Lord Cranworth, (*n*) is "a conclusion founded, not on the notion that there could be a varying interpretation of the will according to circumstances which might happen after it was made, but on its evident meaning when it was made." So, in Sparling *v.* Parker, (*o*) where the gift was "to A and to his first and other sons after him in the usual mode of succession," it was held by Sir J. Romilly, M. R., that A (who was a bachelor) took an estate for his life only.]

Rule excluded by context.

It has been hitherto treated as an undeniable position, that in the devises under consideration, children, if there be any, will take jointly with their parent by purchase; and such certainly is the resolution in Wild's Case, as reported in Coke, (*p*) who lays it down—"If a man devise land to *A*

Rule in Wild's Case.

2. Where there are children at the time of the devise.

(*n*) 10 H. L. Cas. 179. See also per Wood, V. C., 2 K. & J. 674. Lord Cranworth treated the gift as entitling all children born before the death or marriage of testator's sister, and this would seem to be according to the rule as now established.

(*o*) 29 Beav. 450. And in Grieve *v.* Grieve, L. R., 4 Eq. 180, testatrix gave a house to her two nieces (then spinsters) "and to their children, and if they have not any," over; "the furniture to go with the house." The gift of the furniture was held by Malins, V. C., to show that the nieces were not intended to take estates tail in the house.]

(*p*) 6 Rep. 17. The plural "they" and "their" appears to be used by mistake.

and to his children or issue, and *they* then have issue of *their* bodies, there his express intent may take effect according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary: and therefore, in such case, they shall have but a joint estate for life."[2]

And in conformity to this doctrine seems to be the case of Oates d. Hatterley *v.* Jackson, (*q*) where a testator devised to his *wife J. for her life, and after her decease to his daughter B. *and her children* on her body begotten or to be begotten by W. her husband *and their heirs* forever. B had one child at the date of the will, and afterwards others; and it was held that she took jointly with them an estate in fee, and consequently that on their deaths (which had happened) she became entitled to the entirety in fee. This, it will be observed, was the case of a devise *in fee.*

To A and her children, and their heirs.

But in Jeffery *v.* Honywood, (*r*) where a testator gave certain estates, subject to charges, to A, and to all and every the *child and children* whether male or female of her body lawfully issuing, and *unto his, her and their heirs or assigns forever as tenants in common.* A died in the lifetime of the testator, leaving ten children. (It is not expressly stated whether any of the children were living at the date of the will, but it seems probable that this was the case.) The question was, whether A took an estate in fee in an eleventh share, the consequence of which would be that it lapsed by her death in the testator's lifetime. The affirmative was contended for on the authority of Oates *v.* Jackson; but Sir J. Leach, V. C., held that A had a life estate only; he said, "There are two gifts, one to the mother, without words of limitation superadded, and another to her children, their heirs and

Children held to take by way of remainder.

2. A gift to A *and* her children, if there are children living at the date of the will or at the time of the testator's death, makes them joint tenants, Estate of Utz, 43 Cal. 200; Lord *v.* Moore, 20 Conn. 122; Hayle *v.* Jones, 35 Ga. 40; Allen *v.* Hoyt, 5 Metc. 324; Hamilton *v.* Pitcher, 53 Mo. 334; Allen *v.* Claybrook, 58 Id. 124; Jones *v.* Jones, 2 Beas. 236; Graham *v.* Flower, 13 Serg. & R. 439; Merrymans *v.* Merryman, 5 Munf. 440; or tenants in common, if joint tenancy is abolished by statute, Turner *v.* Patterson, 5 Dana 292; Annable *v.* Patch, 3 Pick. 360; Moore *v.* Leach, 5 Jones L. 88; Coakley *v.* Daniel, 4 Jones Eq. 89, 93; Chesnut *v.* Meares, 3 Jones Eq. 416. So an agreement to convey to A "and his lawful children," Cessna *v.* Cessna, 4 Bush 516. So a devise to A "and her 3 children B, C and D conjointly," Proctor *v.* Smith, 8 Bush 81.

(*q*) 2 Stra. 1172. See also Buffar *v.* Bradford, 2 Atk. 220; [Caffary *v.* Caffary, 8 Jur. 329.]

(*r*) 4 Mad. 398. See also Newman *v.* Nightingale, 1 Cox 341, stated *ante* vol. I., p. *516.

assigns; and these two gifts can only be rendered sensible by construing, as the words import, a life estate to the mother, and a *remainder in fee* to the children. In Oates *v.* Jackson the mother was, by the plain force of the expression, comprehended in the limitation in fee."[3]

Observations upon Jeffery *v.* Honywood.

The difference of expression, however, in the two cases is extremely slight. In Jeffery *v.* Honywood, the gift is "to A and *to* all and every the child and children." In Oates *v.* Jackson, "to A and her children." The only difference consists in the word "to," and, according to one report of the latter case, even this slight difference is extinguished, the expression there being "to B and *to* the children of her body." (*s*)

3. In Sisson *v.* Seabury, 1 Sumn. C. C. 235, a devise to A "and to his male children lawfully begotten of his body and their heirs forever to be equally divided amongst them and their heirs forever," A being unmarried at the time of the testator's death, was held to give A an estate for life, with a contingent remainder to male children as purchasers; so in Furlow *v.* Merrell, 23 Ala. 705, 716; but if A had then had children, all would have taken jointly, Carr *v.* Estill, 16 B. Mon. 309, 313; so "for the benefit of herself and her children," Rich *v.* Rogers, 14 Gray 174; Matter of Sanders, 4 Paige 293. So in McCroan *v.* Pope, 17 Ala. 612, a devise in trust "for the sole and separate use and maintenance of A and her children during her natural life," and after her death to her children. So in Hubbard *v.* Selser, 44 Miss. 705, "to A and B and to their children after their decease." So in Goss *v.* Eberhart, 29 Ga. 545, a bequest to the testator's daughters "and their children, heirs of their body," gives the daughters a life estate, with remainder to their children born and to be born; so Jackson *v.* Coggin, Id. 403; so a devise to A for life, and remainder to her children, to be paid after her death, Springer *v.* Arundel, 64 Penna. St. 218. So a devise to A and wife for life, and after their death "to their children, the heirs of their bodies, forever," Doe *v.* Jackman, 5 Ind. 283. So to "W. *and to his children after his death*," W. took a life estate only, with remainder to his children as purchasers, Reeder *v.* Spearman, 6 Rich. Eq. 88. See also Lowry *v.* Muldrow, 8 Rich. Eq. 241.

In Dunn *v.* Bank of Mobile, 2 Ala. 152, a devise to "A and her children" was construed to be a tenancy in common, joint tenancy being abolished in Alabama; but see Nimmo *v.* Stewart, 21 Id. 682, 691; Vanzant *v.* Morris, 25 Id. 285. And where the gift was for the use of A and her children, and after her death for the use of her children, all took as tenants in common for A's life, with remainder to the children, Banks *v.* Jones, 50 Ala. 480.

It was said by Walworth, C.: "I am not aware, however, of any case where the parent's estate was expressly limited to him for life, with the remainder to the children of his body, in which the term children was construed a word of limitation, and not of purchase; whether such parent had or had not children living at the time of making the will. Indeed, such a construction of a will which contained a devise in that form, would unavoidably defeat the intention of the testator." In the matter of Sanders, 4 Paige 293, 297.

(*s*) 7 Mod. 459. It has been justly re-

Even supposing the words of the limitation not to apply to the mother, (in which case, however, it might have been con*tended that she took the fee by force of the word "estates,") it is difficult to see upon what ground the devise to the children could be held to be a *remainder* expectant on the mother's estate, and not to be immediate or in possession as to all the objects. His Honor's objection to the latter construction is, that "after-born children would be included in this devise, and it is a singular intention to impute to a father, that he means his daughter's personal interest in an estate should continually diminish upon the birth of a new child." But, according to all the authorities, (*t*) including a decision of the V. C. himself, (*u*) an *immediate* gift *to children vests exclusively in the objects living at the death of the testator.*

Jeffery *v.* Honywood seems to be inconsistent with, and must, therefore, be considered as overruled by Broadhurst *v.* Morris (*x*) already stated. It is true that the former case was cited with seeming approbation in Bowen *v.* Scowcroft (*y*) by Alderson, B., who founded the latter decision mainly on its authority; but the cases are, it is submitted, distinguishable.

Children held to be a word of limitation, notwithstanding the existence of children.

[The second branch of the rule will not any more than the first be applied where it would defeat the intention as shown by the context. To give effect to the intention so manifested] the courts will construe "*children*" a word of limitation, notwithstanding the existence of children.[4] Thus, in Wood *v.* Baron, (*z*) where a testator devised to his daugh-

marked, however, that the substitution of the words "his, her and their" for the simple "their" of Oates *v.* Jackson showed the testator's idea that it was probable (*qu.* possible) that only one, and that either male or female, might become entitled to his bounty; whereas, if he had intended the mother to take as tenant in common in fee, in no case would the estate have gone to one male. Prior on Issue, &c., pl. 54.

(*t*) Heathe *v.* Heathe, 2 Atk. 121; Singleton *v.* Singleton, 1 B. C. C. 542, n., and other cases cited *ante* p. *155.

(*u*) Scott *v.* Harwood, 5 Mad. 332.

(*x*) 2 B. & Ad. 1. [See acc. per Wood, V. C., 2 K. & J. 673, and Cormack *v.* Copous, 17 Beav. 403.]

(*y*) 2 Y. & C. 640, stated *post* ch. XLVIII., *ad fin.*

4. The word *children* has been held to be a term of limitation carrying an estate tail in the following cases: Parkman *v.* Bowdoin, 1 Sumn. C. C. 359, "to A and to his lawfully begotten children in fee simple," with devise over on failure of children; Vanzant *v.* Morris, 25 Ala. 285, to A and her children, where A had no children at the time of testator's death; so Nightingale *v.* Burrell, 15 Pick. 104; Stokes *v.* Tilly, 1 Stockt. 130; Jenkins *v.* Hall, 4 Jones Eq. 334; Moran *v.* Dillehay,

(*s*) 1 East 259.

ter his whole *estate* and effects, real and personal, *who should hold and enjoy the same as a place of inheritance to her and her children, or her issue, forever;* and if his daughter should die leaving no child or children, or if her children should die without issue, then over. It was held that the daughter took an estate tail, though she had issue at the time of the making of the will, and of the death of the testator.

Devise to A as a "place of inheritance to her and her children, or her issue."

[So in Webb *v.* Byng, (*a*) where the testatrix, Anne Cranmer, devised as follows:—"I give in trust to my executors for my niece Mary Anne Byng and her children all my Q. estates, provided she takes the name of Cranmer and arms, and her children, with my mansion-house, plate, books, linen, &c., Archbishop Cranmer's portrait by Holbein," and other articles "as heir*looms with my estate:" there were children of Mary Anne Byng *in esse* at the date of the will and at the death of testatrix; but it was held by Sir W. P. Wood, V. C., that Mary Anne Byng took an estate tail. She and her children could not take concurrently; since that would involve this manifest absurdity, viz., that they must all live together in the same house and enjoy the various articles given as heir looms with the estate. And the object of the testatrix being to perpetuate the name of Cranmer, she could not have intended that Mary Anne Byng should take for life, with remainder to her eight children as joint tenants in fee; because then, independently of the fact that Jeffery *v.* Honywood had been overruled by Broadhurst *v.* Morris, the estate would by that construction be divisible into eight separate estates, and as the parties to take the property were also to take the name and arms, the result would be to found as many small families all bearing the name and arms of Cranmer, whereas the testatrix spoke of her estate as one and indivisible and to be enjoyed in its entirety.

Devise to A and her children of mansion-house with articles as heirlooms.

So a devise of the testator's "property to A and his children in suc-

8 Bush 434, to A "and her children forever;" see also Lachland *v.* Downing, 11 B. Mon. 32; Wheatland *v.* Dodge, 10 Metc. 502, "to A, his children or grandchildren," there being children but no grandchildren then living. Haldeman *v.* Haldeman, 40 Penna. St. 29, to children for life, and after their death "to descend to their children," and if either "die and leave no lawful issue, over." Johnson *v.* Johnson, McMullan Eq. 345, "to A and to her children after her."

See also Anderson on "The Word Issue," Phila., 1878; Jones *v.* Jones, 2 Beas. 236; Estate of Utz, 43 Cal. 200.

[(*a*) 2 K. & J. 669; affirmed 8 D., M. & G. 633, and 10 H. L. Cas. 171 (Byng *v.* Byng.)

"To A and his children in succession."

"To A to her and her children."

cession" has been held to give A an estate tail although he had children at the date of the will. (b) And a devise "to my daughter A to her and her children forever," she being with child at the date of the will, was held to make A tenant in tail on the ground that the words "to her" would be surplusage if the words "and her children" were words of purchase and not of limitation. "To her," &c., was read as the *tenendum* defining what estate A was to take by the previous devise.] (c)

In Seale *v.* Barter (d) Lord Alvanley observed that, according to the report of Wild's Case in Moore, (e) two of the judges thought it was an estate tail in him, though there were children at the time of the devise; but probably it did not occur to his lordship that the devise in that case was to A and his wife, and *after their death* to their children, which it is now admitted on all hands gives an estate for life to the parents, with remainder to their children; so that the notion as to its being an estate tail was clearly untenable. (f) Had the observation been applied *to a devise to A and his children simply, it might have had more weight.

Rule whether applicable to *bequests of* personalty;

The word "children" seems to have been construed as a word of limitation (in a very obscure will) in Doe d. Gigg *v.* Bradley, (g) where a testator bequeathed a *leasehold* property to A and B for life share and share alike, with survivorship for life to A, and after their decease to the children of A, "to be equally divided between them share and share alike, and to the survivor of them *and their children;*" it was held that these words were words of limitation, applicable to the gift to the children, (though there were children of such children living at the death of the testa-

(b) Earl of Tyrone *v.* Marquis of Waterford, 1 D., F. & J. 613.

(c) Roper *v.* Roper, 36 L. J., C. P. 270, and in Ex. Ch., L. R., 3 C. P. 32. It was doubted by Kelly, C. B., in this case, whether a child *en ventre* could be considered *in esse* within the rule (as to which *vide sup.* p. *186); and, if it could, whether one child would satisfy the word "children" in the plural; but see Oates d. Hatterley *v.* Jackson, 2 Str. 1172.]

(d) 2 B. & P. 485, *ante* p. *390.

(e) 397, pl. 519, *nom.* Richardson *v.* Yardley.

(f) See also his lordship's observations upon Hodges *v.* Middleton, stated *ante*, in Seale *v.* Barter, 2 B. & P. 494, which are susceptible of the same answer. [But a devise to A for life, remainder to "his children and so on forever, and for want of such children," over, is an estate tail in A, Trash *v.* Wood, 4 My. & Cr. 328.]

(g) 16 East 399. [See also Snowball *v.* Procter, 2 Y. & C. C. C. 478 (to children and their children after them.)

tor,) (*h*) and accordingly it was to be construed as a gift to the children absolutely, (*i*) with survivorship between them for *life*. 5

This case has too much of peculiarity to authorize any general conclusion. Lord Hardwicke, in Buffar *v.* Bradford, (*k*) seems to have been adverse to the application of the rule in Wild's Case to personal estate, where, he said, the effect of construing *children* to be a word of limitation must be, that the first taker would have all; and in Audsley *v.* Horn, Lord Campbell decided that the rule was not generally applicable to personal estate. (*l*)

In such cases, however, the point seems to be immaterial; for as the rule only applies where there is no child to take jointly with the parent, and as the absolute interest in personalty passes without words of limitation, the result is, that the parent, as the only existing object at the time of distribution, would be solely entitled *quacunque via*. (*m*)

—to bequests of personal annuities.

[There is one class of cases, however, where the point would be material; that is, where there is a gift of an annuity to a person and his children. For though a simple gift of personalty or of the dividends or annual proceeds of a specified fund, passes the absolute interest to the legatee without words of *limitation; (*n*) yet where an annuity is so given, the annuitant takes only for life. (*p*)]

What context will give life interest to

Indeed, with respect to personal estate, an attempt has often been made [on slight grounds], and sometimes with success, to cut down the parent (according to Sir J. Leach's construc-

(*h*) It does not appear whether any were living at the date of the will; possibly there were, as one of the children of A was then married.]

(*i*) See rule discussed ch. XLIV.

5. See Shearman *v.* Angel, Bailey Eq. 351; Reeder *v.* Spearman, 6 Rich. Eq. 88, 93; Johnson *v.* Johnson, McMullan Eq. 345; Cleveland *v.* Havens, 2 Beas. 101; Fairchild *v.* Crane, Id. 105; Moore *v.* Paul, 7 Rich Eq. 358.

(*k*) *Ante* p. *392.

[(*l*) 1 D., F. & J. 226, affirming 26 Beav. 195. See also Stone *v.* Maule, 2 Sim. 490; Heron *v.* Stokes, 2 Dr. & War. 89, 1 Con. & Law. 270; Sugd. Law of Prop. 236, *et seq.*]

(*m*) See Cape *v.* Cape, 2 Y. & C. 543. And the result would be the same in reference even to real estate under wills made or republished since 1837, as the fee would pass by such wills without words of limitation.

[(*n*) Heron *v.* Stokes, 2 Dr. & War. 89, 12 Cl. & Fin. 161; Kerr *v.* Middlesex Hospital, 2 D., M. & G. 576; Bent *v.* Cullen, L. R., 7 Ch. 235.

(*p*) Savery *v.* Dyer, Amb. 139; Yates *v.* Maddan, 3 Mac. & G. 532; and the rule is not altered by the stat. 1 Vict., c. 26, Nichols *v.* Hawkes, 10 Hare 342. As a personal annuity cannot be entailed, the limitation to children, if it attracted the rule in Wild's Case, would create a conditional fee, Stafford *v.* Buckley, 2 Ves. 170.]

parent with remainder to the children.

tion in Jeffery *v.* Honywood) to a life interest, the children taking the ulterior interest by way of remainder. Thus, in Crawford *v.* Trotter (*q*) (a decision of the same judge), a bequest of £1000 reduced annuities to A and her heirs (say children), was held to give a life interest to A, and the capital to her children, [the word "heirs," which was used as synonymous with "children," importing that they were to take after her death.]

So, in Morse *v.* Morse, (*r*) where a testator gave to his daughter A *and her children* £5000 for their sole use and benefit, £3000 to be paid in one year after his decease, and £2000 after the decease of his wife, and appointed A. B. *trustee of those sums for his daughter and her children;* Sir L. Shadwell, V. C., held the £5000 to be in trust for the daughter for life, and after her decease for all her children, whether born in the testator's lifetime or after his decease.

[Again, in Vaughan *v.* Marquis of Headfort (*s*) a testator bequeathed a legacy to A and his children, *to be secured for their use*, and Sir L. Shadwell, V. C., held that, as the latter words were inapplicable to A, since he might have taken his share and secured it for himself, they could only mean that the fund was to be secured for A for life, and for his children after his decease.

So, where the testator shows that the children when they take are to take the whole fund; as, where the bequest was in trust for A (then an infant) and such younger sons as she might have in equal shares, and if but one, then the whole to such one; (*t*) or to A (then a spinster) and her children, but if *they* (which could only mean the children) should die without issue, the whole to go over: (*u*) so, where the children are to take in unequal shares, which is incompatible with a joint tenancy *with the parent; (*x*) or where the testator appears to contemplate that their title will arise, or that the class will be ascertained, at the death of the parent, as, in the case of a bequest to A and B and their children, "without comprehending the husband of A and B unless they should die without issue," (*y*) or to A "for the

(*q*) 4 Mad. 361.

(*r*) 2 Sim. 485.

[(*s*) 10 Sim. 639. See also Combe *v.* Hughes, L. R., 14 Eq. 415; Ogle *v.* Corthorn, 9 Jur. 325.

(*t*) Garden *v.* Pulteney, 2 Ed. 323, Amb. 499.

(*u*) Audsley *v.* Horn, 26 Beav. 195, 1 D., F. & J. 226.

(*x*) Per James, V. C., Armstrong *v.* Armstrong, L. R., 7 Eq. 522, approved by Lord Hatherley, L. R., 7 Ch. 257.

(*y*) Dawson *v.* Bourne, 16 Beav. 29. See also Lampley *v.* Blower, 3 Atk. 396, *post* ch. XXXIX., § 1, n.; and cf. Fisher *v.* Webster, L. R., 14 Eq. 283.

benefit of herself and such children as she then had or thereafter might have by her then husband;" (z)—in all these cases the parents were held to take a life interest with remainder to their children. And where the testator gave a pecuniary legacy in trust for A for life with remainder to her children "exclusive of the two eldest;" and then gave the residue to A and her children, "including the two eldest," the gift of residue was construed by reference to the pecuniary bequest. (a) The exclusion of the two eldest children from the latter being the only apparent reason for separating the two bequests.

It was even said by Sir J. Romilly (b) that "generally under a gift to a wife and her children, if there was nothing to denote the proportions in which they were to take, the most natural disposition was to give the property to the wife for her life, and afterwards to her children," and he cited Crockett v. Crockett (c) as having laid down that rule. In that case, however, Lord Cottenham expressly distinguishes a simple gift to the mother and her children from one where there is an indication, however slight, of an intention that the children should not take jointly with the mother, (d) and throughout his judgment it appears to be assumed that in the absence of all indication of such an intention concurrent interests will be created. And such is clearly the law. Thus,] in Pyne v. Franklin, (e) where a testator gave £200 to each of his nieces and their children, to be paid within nine months after the death of his wife, amongst his nieces *and their children*, as his wife should by will appoint. The wife died without having made any appointment. The executors, *within nine months after her death, paid the legacies to the nieces, who afterwards died without having had any child. It was held that the payment was properly made.

Parent and children take concurrently where no contrary intention appears.

[So, in Newill v. Newill, (e) where a testator bequeathed all his prop-

(z) Jeffery v. De Vitre, 24 Beav. 296.

(a) In re Owen's Trusts, L. R., 12 Eq. 316. See also Cator v. Cator, 14 Beav. 463; and Parsons v. Coke, 4 Drew. 296, where gift of accruing shares was governed by gift of original shares.

(b) Salmon v. Tidmarsh, 5 Jur. (N. S.) 1380, where, however, *on the context* the wife and children were held to take concurrently. See also Ward v. Grey, 26 Beav. 485; and Lord St. Leonards' remarks cited *ante* p. *390, n. Instructions, or an executory trust, for a settlement on A and her children will be executed by making A tenant for life with remainder to the children, In re Bellasis' Trusts, L. R., 12 Eq. 218; Cator v. Cator, 14 Beav. 463.

(c) 2 Phill. 553, stated vol. I., p. *401.

(d) See 2 Phill. 555, 556.]

(e) 5 Sim. 458.

[(e) L. R., 7 Ch. 253, reversing Malins, V. C., L. R., 12 Eq. 432, and discussing the principal authorities.] See also De

Newill v. Newill.

erty, real and personal, to his wife for the use and benefit of herself and all his children, whether by her or by his former wife, and appointed his wife and other persons his executors; it was held by Lord Hatherley that the wife and children took as joint tenants; that this was the ordinary construction in the absence of a different intention being indicated in the will, and that although very small circumstances had been laid hold of, the mere circumstance that had been urged in argument, of the wife being made trustee, was not enough to warrant the court in presuming that the fund was intended to be settled on herself for life, with remainder to the children.[6]

Trust for separate use of parent, when it excludes the rule.

A declaration annexed to a bequest to a woman and her children, that she shall be entitled for her separate use, is not sufficient of itself to exclude the general rule, (*f*) unless it can be collected that the declaration is intended to affect the whole fund.] (*g*)

Devises to *sons* not distinguishable from devises to *children*.

The same principle which regulates devises to children applies to devises to *sons*, the only difference being that the estate tail, which the latter term, where used as *nomen collectivum*, creates, will be an estate tail *male*. (*h*) A devise to A for life, and after his decease to his sons, of course gives to A an estate for life, with remainder to his sons as joint tenants, which remainder will be either for life or in fee, according as the will is regulated by the old or the new law.

Witte *v.* De Witte, 11 Sim. 41; Sutton *v.* Torre, 6 Jur. 234; [Lenden *v.* Blackmore, 10 Sim. 626; Paine *v.* Wagner, 12 Id. 184; Read *v.* Willis, 1 Coll. 86; Cunningham *v.* Murray, 1 De G. & S. 366; Gordon *v.* Whieldon, 11 Beav. 170; Beales *v.* Crisford, 13 Sim. 592; Mason *v.* Clarke, 17 Beav. 126; Curtis *v.* Graham, 12 W. R. 998; Bibby *v.* Thompson, 32 Beav. 646; Fisher *v.* Webster, L. R., 14 Eq. 283.

6. A devise in trust for "A and her children," she then having children, gives A a life estate, with remainder to the children, Faribault *v.* Taylor, 5 Jones Eq. 219; see also Harris *v.* McElroy, 45 Penna. St. 216; White *v.* Williamson, 2 Grant Cas. 253; or in trust to A for life, and after her death to convey to her children, Perry *v.* Lowber, 49 Penna. St. 483; so a devise to A for life, and "immediately after her decease to her children, if any, in fee," Cote *v.* Von Bonnhurst, 41 Penna. St. 243.

(*f*) De Witte *v* De Witte, 11 Sim. 41; Bustard *v.* Saunders, 7 Beav. 92, 7 Jur. 986; Fisher *v.* Webster, L. R., 14 Eq. 283.

(*g*) Frogatt *v.* Wardell, 3 De G. & S. 685 (a somewhat special case.) See also French *v.* French, 11 Sim. 257; Bain *v.* Lescher, Id. 397; which, however, in this respect are similar to De Witte *v.* De Witte and Bustard *v.* Saunders, *sup.*

(*h*) 1 Bulst. 219, Bendl. 30.]

II.—We now proceed to consider a point which has often occupied the attention of the courts, and still more frequently that of the conveyancing practitioner—namely, whether the *word "son" or "child"[7] in the singular is a word of limitation; which, of course, is commonly its effect where used in a collective sense, *i. e.*, as synonymous with issue male or issue general.

"Son," "child," "daughter," &c., where used as *nomina collectiva.*

One of the earliest cases of this kind is Bifield's Case, (*i*) where, upon a devise to "A, and if he dies *not having a son*, then" over to the heirs of the testator, it was held the word "son" was used as *nomen collectivum*, and that the devise created an entail.

To A, and if he die *not having a son.*

So, in Milliner *v.* Robinson, (*k*) where a testator devised to his brother J., and if he should die *having no son*, that the land should remain over; it was held that J. had an estate tail.

To J., and if he die having no son.

Again, in Robinson *v.* Robinson, (*l*) where the testator devised his real *estate* to L. for the term of his natural life and no longer, provided he altered his name and took that of R. and lived at the testator's house at B., and after his decease *to such son as he should have lawfully to be begotten* taking the name of R., and for default of *such* issue, then over to W. in fee; and the testator willed that L. might present whom he pleased to any vacancy in any of the testator's presentations during his (L.'s) life, and that bonds of resignation should be given in favor of L.'s children who were designed for holy orders; and, after the same should be disposed of as aforesaid, gave the *perpetuity* of the presenta-

To A for life, and after his death "to such son as he shall have."

7. "Child," "children" are usually words of purchase, Murphy *v.* Harvey, 4 Edw. 132; Matter of Sanders, 4 Paige 293; Moon *v.* Stone, 19 Gratt. 130; Beacroft *v.* Strawn, 67 Ill. 28; Reeder *v.* Spearman, 6 Rich. Eq. 88; Baker *v.* Scott, 62 Ill. 86; Rogers *v.* Rogers, 3 Wend. 503; Chrystie *v.* Phyfe, 19 N. Y. 344; Guthrie's Appeal, 37 Penna. St. 9; Vanzant *v.* Morris, 25 Ala. 285; Merrymans *v.* Merryman, 5 Munf. 440; Fairchild *v.* Crane, 2 Beas. 105; Turner *v.* Patterson, 5 Dana 292; Stubbs *v.* Stubbs, 11 Humph. 43.

(*i*) Cited by Hale, C. J., in King *v.* Melling, 1 Vent. 231. [See also Andrew *v.* Andrew, 1 Ch. D. 410; with which compare Bennett *v.* Bennett, 2 Dr. & Sm. 274, stated below. "Die without having a son" is a phrase the construction of which seems now to be governed by 1 Vict., c. 26, § 29, as to which see ch. XLI., § 4.]

(*k*) 1 Moore 682, pl. 939, [said by Jessel, M. R., (W. N. 1880, p. 14,) to be the same as Bifield's Case.]

(*l*) 1 Burr. 38, 2 Ves. 225, 1 Kenyon 298, 3 B. P. C. Toml. 180 (Robinson *v.* Hicks.)

tions to the said L. in the same manner and to the same uses as he had given his estates. On a bill to establish the will, Sir J. Jekyll, M. R., held that L. was entitled for life, remainder to his eldest, and but one, son for life, remainder in fee to W.; and Lord Talbot, on appeal, affirmed the decree. But afterwards, a bill having been filed by the second son of L. (the first having died an infant,) the Court of K. B., on a case sent by Lord Hardwicke, certified "that L. must by necessary implication, to effectuate the manifest general intention of the testator, be construed to take an estate in tail male." The Lords Commissioners, who succeeded Lord Hardwicke in the custody of the great seal, confirmed this certificate; and their decree was affirmed in D. P. after great consideration and with the concurrence of all the judges.

Remark on Robinson v. Robinson.

*The authority of this case has long been beyond the reach of controversy, not only from its having been decided by the highest tribunal, but in consequence of its frequent recognition. Lord Kenyon founded a great number of decisions (m) upon it, and though he did not invariably advert to the true principle (sometimes laying an undue stress on the words "in default of *such* issue") which a long line of cases has established to be merely referential, (n) yet, in Doe v. Mulgrave, (o) he distinctly treated the case as standing on the ground to which it has been here referred.

To A, and if she marries and has a son, then to that son.

Again, in Mellish v. Mellish, (p) where the devise was in these words: "Hamels to go to my daughter C. M. as follows: *in case she marries and has a son, to go to that son;* in case she has more than one daughter at her death, or her husband's death, *and no son,* to go to the eldest daughter; but in case she has but one daughter, or no child at that time, I desire it may go to my brother W. M." In a subsequent part of his will the testator added, "Mrs. P. to receive £200 a year from C. M., during the life of Mrs. P." The question was what estate C. M. took in Hamels. It was contended for her, on the authority of Wight v.

(m) See Hay v. Coventry, 3 T. R. 86; Doe v. Applin, 4 Id. 82; Denn d. Webb v. Puckey, 5 Id. 303; Doe d. Candler v. Smith, 7 Id. 533; Doe d. Bean v. Halley, 8 Id. 5; Doe d. Cock v. Cooper, 1 East 235.

(n) See *post* ch. XL., § 3. In this observation, which the writer has found it necessary often to make, he leaves out of view the well-known operation of the words "in default of such issue" to create cross remainders among several tenants in tail, which turns on a different principle.

(o) 5 T. R. 323.

(p) 2 B. & Cr. 520. Examine the case of Seaward v. Willock, 5 East 198, in reference to this doctrine.

Leigh, (q) Wharton v. Gresham, (r) Chorlton v. Craven, (s) Sonday's Case, (t) and Wyld v. Lewis, (u) that she took an estate tail. On the other side it was insisted that C. M. took the fee by the effect of the annuity made payable by her, (x) and which fee was defeasible on either of three events: first, if she married and had a son, it was to go to that son; secondly, if she had more than one daughter and no son, it was then to go to the eldest daughter; and, thirdly, if she had no child at all (or, it seems, if she had only one daughter), it was to go to W. M. The court, however, held that C. M. took an estate tail male. Bayley, J., said, "It may be collected from the authorities that if the word *son* be used, not as *designatio personæ*, but with a view to the whole class, or as comprising the whole of the male descendants severally and successively, then it is the manifest *intention of the testator to give an estate tail; and it is equally clear that words are not to operate as an executory devise which are capable of operating in any other way. In this case the words are, 'Hamels to go to my daughter C. M. as follows, viz., in case she marry and has a son, then it is to go to that son.' Now, if the word 'son' be used as *nomen collectivum*, it would give to C. M. an estate to continue as long as there should be any male descendants of her, and that would be an estate in tail male. I cannot find in the subsequent part of this will anything inconsistent with the construction that ought to be put upon it, if he had stopped here." Holroyd, J., said the word "son" should be read *any son*.8 The court afterwards certified "that C. M. took an estate in tail male, with a reversion in fee, (y) subject to other estates created by this will."

"Son," held to be a word of limitation.

It is evident, from the concluding words of the certificate, that the

(q) 15 Ves. 564, *post*.

(r) 2 W. Bl. 1083: *ante* p. *489, n.

(s) Cit. 2 B. & Cr. 524, *post* p. *407.

(t) 9 Rep. 127.

(u) 1 Atk. 432, *post*.

(x) And other grounds which were clearly inadequate.

8. No inflexible rule can be laid down as to whether the words "sons," "child," "children," "heirs," "heirs of the body" shall be considered words of purchase or of limitation. But these words will be either words of purchase or limitation, according to the intent of the testator in each particular will, Yarnall's Appeal, 70 Penna. St. 335; Haldeman v. Haldeman, 40 Id. 29; Kleppner v. Laverty, 70 Id. 70; Lachland v. Downing, 11 B. Mon. 32; Edwards v. Bibb, 43 Ala. 666; Tongue v. Nutwell, 13 Md. 415; Akers v. Akers, 8 C. E. Gr. (N. J.) 26; Stokes v. Tilly, 1 Stockt. 130; Wheatland v. Dodge, 10 Metc. 502; Moran v. Dillehay, 8 Bush 434.

(y) She was heir-at-law.

Remark on Mellish v. Mellish.

court considered the eldest daughter would take an estate in the event described. The intention expressed in favor of the *eldest* daughter, of course, would not operate to confer on the parent an estate tail which would descend to daughters.

"Son" held to be a word of limitation.

Again, in Doe d. Garrod v. Garrod, (z) where a testator by his will devised thus: "As to my worldly estate, I dispose thereof as follows: I give to my nephew T. G. all my lands, to have and to hold during his life, *and to his son, if he has one, if not,* to the eldest son of my nephew J. G. and to his son after him, if he has one, if not, to the regular male heir of the G. family." By codicil, stating that his nephew T. G. then had a son born, the testator gave all his lands to that son after his father's decease; and to his "*eldest son, if he has one;* but if he has no son, then to the next eldest regular male heir of the G. family." It was held that by the will and codicil the son of T. G. took an estate tail. Lord Tenterden, C. J., considered that the testator did not intend the estate to go over to the G. family while any issue male of his great nephew should remain, and that the giving an estate tail to the devisee was warranted by Sonday's Case.

So, in Doe d. Jones v. Davies, (a) where a testator, after premising that, should his daughter die unmarried, he would not have his estate sold or frittered away after her decease, but that it should be entailed, devised all his real estate to trustees, to permit his daughter, not only to receive the rents and profits *thereof for her own use, or to sell or mortgage any part, if occasion required; but also to settle on any husband she might take the same or any part thereof for life, should he survive her, but not without his being liable to impeachment for waste or non-residence, or neglecting repairs. He then added, that

Word "child" held to be used as *nomen collectivum*, and to confer an estate tail.

should "*my daughter have a child I devise it to the use of* SUCH CHILD from and after my daughter's decease, with a reasonable maintenance for the education, &c., of such child in the meantime. Should *none of these cases happen,*" the testator devised the estate to a nephew, subject to a condition to reside, &c., and to his first and every other son, and in default he gave the estate to another person on a like condition, and his first and every other son. The will then proceeded as follows:—"My will and meaning for having the house and farm occupied is for the sake of improving the neighborhood as far as my poor abilities extend, which would

(z) 2 B. & Ad. 87.

(a) 4 B. & Ad. 43.

be otherwise proportionably impoverished, for protecting the parish and supporting its poor. This I am persuaded is my daughter's wish as well as my own, whom I by no means will to restrain as a tenant for life; but in case that either of the remaindermen should ill-treat her, or should be likely to turn out an immoral man, or a bad member of society, she may, by the advice or consent of the trustees, set aside such an one by her own will and testament, that my intention of doing good in the neighborhood might not be defeated. I recommend it to my daughter, for *want of issue to herself*, not to leave in legacies above five or six hundred pounds, and that out of my charge on Nevern," (a distinct property of the testator), "which I have also articled for, and entail the rest for the further support of this house." At the time of the making of the will, and at the death of the testator, the daughter had no child. It was held, that the word "child," as here used, was *nomen collectivum;* it being evident from the whole tenor of the will that the testator intended that the estate should not go over to the devisees in remainder until the failure of issue of his daughter. The court considered that the case came within the principle of those in which the word *son* had been held to be *nomen collectivum*, particularly Bifield's Case.

To this class of cases it is conceived also belongs the case of Raggett *v.* Beaty, (*b*) where a testator devised a messuage to the use of G. (the second son of his nephew J.) to enter upon and *possess the same after the decease of his father, and he directed the said J. and G. to pay the sum of £100 within one year after his decease to A and B upon certain trusts; but in case they did not pay the said sum, he ordered A and B to let the premises and receive the rents until the £100 should be paid, they keeping possession of the deeds and not allowing the said J. and G. either to sell or mortgage any part of the premises until the legacies were all paid and G. was twenty-one years of age; *or, if in case the said G. should die and leave no child lawfully begotten of his own body*, it was his will that the said A and B their heirs and assigns should sell the premises and distribute the money arising therefrom amongst his (the testator's) brothers and sisters and C and D or their heirs, in such shares as the trustees should think proper. The question sent for the opinion of the Court of C. P. was, what estate G. had upon the death of his father. It was contended that G. took an

"In case A should leave no child," with context: —Held, to create an estate tail.

(*b*) 2 M. & Pay. 512, 5 Bing. 243.

estate tail as the result of the apparent intention that the estate should not go over unless there was an ultimate indefinite failure of issue of G.; and the cases relied upon for this construction were those in which words importing a failure of issue had been so construed. On the other side it was argued that the intention to be collected from the whole will was, that G. should take an estate in fee, with an executory devise over in case of his not leaving issue at his death; and the argument for holding the devisee to take a fee was founded mainly on the testator's direction to the devisees to pay the £100; and no attempt seems to have been made to distinguish the word "child," as used in this devise, from the word "issue" which occurred in the cited cases. The court, however, certified that G. took an estate tail.

Remark on Raggett v. Beaty.

This is the most signal instance in which an estate tail has been created by a devise over in case of the prior devisee leaving no child, though the tenor of the authorities discussed in the present chapter and some others, especially Doe v. Webber, (c) (in which Lord Ellenborough made very little difficulty of construing the word "children" in such a position as synonymous with *issue*,) had certainly paved the way to such a result. An example of this species of construction has since occurred (though with an assisting context), in Doe d. Simpson v. Simpson, (d) where a testator gave certain lands to his son A his heirs and *assigns forever; but if it should happen that A should die *without leaving any child or children*, he devised the estate to B, C, D, E and F, their heirs and assigns forever as tenants in common, with a limitation over to the survivors in case of any of them dying under age and without issue. And the testator in a certain event devised other property, subject to the same mode of distribution among the five devisees over as the before-mentioned property given to A "in case he died *without issue*." It was considered by the court that the testator had, by the latter clause, expressly declared the meaning of the prior devise to be, if the first taker should die *without issue*. (e) [They thought, however, that even without this clause there

Words referring to leaving no *children* held to mean, leaving no *issue*.

(c) 1 B. & Ald. 713. See also Hughes v. Sayer, 1 P. W. 534, *ante* p. *198; Wyld v. Lewis, 1 Atk. 432, *post;* [Voller v. Carter, 4 El. & Bl. 173; Coles v. Witt, 2 Jur. (N. S.) 1226.]

(d) 5 Scott 770, 4 Bing. N. C. 333, 3 M. & Gr. 929.

Question whether words referring to failure of issue meant children, as in another gift in same will.—(e) A strong instance of refusal to construe the word "issue" as synonymous with *children* occurs in the case of Malcom v. Taylor, 2 R. & My. 416, as the testator had, in ref-

would have been strong grounds for coming to the same conclusion. And in Bacon *v.* Cosby, (*f*) where a testator left "his entire *fortune* equally divided between his two daughters, and directed that the portion of his youngest daughter should devolve, in case of her dying without children, to his eldest daughter and her children;" a similar construction prevailed, though there was no explanatory context, and the consequence was that the gift over was void as to the personal estate. The younger daughter never had a child, (*g*) but the elder had two children living at the date of the will, and, in giving judgment, Sir J. K. Bruce, V. C., said that, according to the whole course of the decisions and the plainest rules of construction, the younger daughter would have been held to take an estate tail in the realty, and an *absolute interest in the personalty, but for the words "and her children" occurring at the end of the will and applied to the elder daughter, coupled with the fact that the elder daughter had children at the date of the will. This, however, he thought was much too slight and conjectural a ground for departing from a settled rule of construction.]

An instance of the word "child" being construed as qualifying the word "heirs" in the preceding devise, is afforded by Doe d. Jearrad *v.* Banister, (*h*) where a testator devised a certain property to A and her heirs, *if she has any child;* if not, after the

"If she has any child."

erence to another subject-matter, clearly used the word issue in that sense.

A bequeathed the residue of her funded property and her plate to B and C for their lives, and after the decease of the survivor to such of the children of C as she should by deed or will appoint,* and in default of appointment, the residue of the money in the funds to be equally divided among the said children; *and, in case C should die without issue as aforesaid,* the testatrix bequeathed her funded property and plate to certain persons. It was held that the words "without issue as aforesaid," in reference to the funded property, meant without such issue as were objects of the prior gift, *i. e.*, children, but that as to the plate, of which there was no gift to the children of C, the words were to be construed as importing a general failure of issue, and consequently that C. was absolutely entitled.

[(*f*) 4 De G. & S. 261. See Egan *v.* Morris, 2 Ll. & Goo. 297, where there was a devise to A for life, with a gift over if he should die unmarried or without children.

(*g*) So that if the devise had been to her and her children, she would have taken an estate tail on the authority of Wild's Case, see 3 M. & Gr. 954. But this reasoning is not applicable in case of personal estate alone, *semb.* Stone *v.* Maule, 2 Sim. 490; Audsley *v.* Horn, *ante* p. *397.]

(*h*) 7 M. & Wels. 292. See Goodtitle d. Cross *v.* Woodhull, Willes 592.

* This power, it is observable, was not considered to raise an implied trust for the children as to the plate.

decease of herself and her husband, then to B and her heirs. It was contended that it was a devise in fee, upon the condition of A having a child; but the Court of Exchequer held that she was tenant in tail.[9]

Whether term "eldest son" used as *nomen collectivum*.

But it is not to be inferred from the preceding cases that a devise, definitely pointing out the eldest, or any other individual son, will (unaided by the context) have the effect of conferring an *estate tail* on the parent. [If any doubt was thrown on this position by Chorlton *v.* Craven, (*i*) it is removed by Parker *v.* Tootal. (*k*) Both cases arose on the same will, in which] the devise was to Thomas C. during his natural life, with remainder to the first son of the body of the said Thomas lawfully begotten severally and successively in tail male of the name of C., and for want of such lawful issue of that name either by his (testator's) son Thomas C. or his son James C., then the testator devised the estate to his daughters and their children, share and share alike. The Court of K. B., on a case from chancery, certified Thomas to be tenant *in tail male*, which was confirmed by Lord Eldon; and in 1823 the Court of Exchequer came to the same decision upon the same devise.

Remark on Chorlton *v.* Craven.

In the absence of all information as to the precise grounds of the decision it might seem that the devise to the son had some influence on the conclusion that Thomas C. had an estate tail male. The words "severally and successively," however, give rise to a strong suspicion that a devise to the second and

9. In a devise to A, "and if she shall die leaving lawful issue, unto such children, a remainder is given to the children by purchase, Chrystie *v.* Phyfe, 19 N. Y. 347; so to A "and such children as shall at her death be living and attain 21," Tayloe *v.* Gould, 10 Barb. 388; or simply be then living, Huber's Appeal, 80 Penna. St. 348; or "if she leaves any at her death," Dougherty *v.* Dougherty, 2 Strobh. Eq. 63; or at her death to be equally divided between her children, share and share alike, Bool *v.* Mix, 17 Wend. 119; Williams *v.* Sneed, 3 Coldw. 533; Stubbs *v.* Stubbs, 11 Humph. 43; Bowers *v.* Bowers, 4 Heisk. 293; Moon *v.* Stone, 19 Gratt. 130; or as tenants in common, Chew's Appeal, 37 Penna. St. 23; or to A and her children, "the children taking their mother's share," Smith's Estate, 9 Phila. 348. So a devise to A to hold "to her and her children forever," with limitation over, if she should die leaving no children, Hannan *v.* Osborn, 4 Paige 336; so to children for life, with remainder to their children, and limitation over if any die without issue, Sheets' Appeal, 52 Penna. St. 257; so to A, "allowing her to make such distribution as she may judge best among my children," Stableton *v.* Ellison, 21 Ohio St. 527; or to A in trust for his children, to be divided among them at his death, Masurié *v.* Penna. Annuity Co., 33 Leg. Int. 176.

(*i*) 3 D. & Ryl. 808, cited 2 B. & Cr 524.

[(*k*) 11 H. L. Cas. 143.

other sons successively in tail was inadvertently omitted: [and the true construction of the will being again mooted in 1865, it was held in D. P., (*l*) that such a devise was necessarily implied by those *words; and that the words "first and other sons" were not words of limitation enlarging the estate of Thomas, but that they gave all the sons of Thomas successively estates in tail male by purchase in remainder after Thomas' life estate. The decision of K. B., according to which Thomas was tenant in tail male, and in which (understanding thereby tenant in tail male in remainder after the estates tail of his sons) the House was inclined to agree, was considered to depend on the subsequent words "in default of *such* issue of that name either by Thomas or James," the word "such" being referred to "male" in the previous gift.] (*m*)

Devise to "eldest son" held not to confer an estate tail male.

A question of this kind was much discussed in Doe d. Burrin *v.* Charlton, (*n*) where a testator devised a messuage to his kinsman S. C. for his life, and after his decease to the *eldest son* of S. C., but for want of such issue, then to his (S. C.'s) daughters or daughter, share and share alike, forever; but in case his said kinsman had no issue, then to hold to S. C. his heirs and assigns forever. It was contended, on the authority of the last case, that the word "son" was to be construed as *nomen collectivum;* and consequently that S. C. took an estate tail male, precedent to the general estate tail which was assumed to arise by implication from the words referring to a failure of issue in the devise over. (*o*) But the court decisively negatived this construction, being of opinion that neither the devise to the eldest son alone, nor the words "for want of such issue" following such devise, created an estate tail. In none of the cases had there been that strict reference to a single individual which occurred in the case before the court, except in Chorlton

(*l*) Parker *v.* Tootal, 11 H. L. Cas. 143. The actual decision turned on a totally different point; but the opinions of Lords Westbury, Cranworth and Chelmsford (as stated above) were deliberately given for the express purpose of discouraging future litigation. Thomas never had a son, and no decided opinion was given whether he was tenant in tail in remainder after the estates expressly limited to his sons with vested remainders over (to which, however, the House inclined), or tenant for life only with contingent remainders over. Either way he had acquired the fee simple by recovery, and this was all that was *decided* in the Court of Exch., Rushton *v.* Craven, 12 Pri. 599.

(*m*) As to this last point, see S. C., mentioned again, ch. XL., § 3, sub-s. 1.]

(*n*) 1 Scott N. R. 290, 1 M. & Gr. 429. And see Foord *v.* Foord, 3 B. P. C. Toml. 124.

(*o*) *Ante* ch. XVII., § 6.

v. Craven, (*p*) where considerable weight was probably attached to the expressions "severally and successively."

[And in Bennett *v.* Bennett, (*q*) where a testator devised all his property to his sister in fee simple, except one tenement, which *she was to have for her life only, "and afterwards to my sister's *eldest son* on his taking the name of M.; but should he refuse to take that name, or *my sister die without a son*," then to P. on his taking the name of M., and so on to his heirs, each of them taking the name of M.; it was contended that "eldest son" taken with the gift over "if my sister die without a son" gave the sister an estate tail: but it was held by Sir R. T. Kindersley, V. C., that primarily "eldest son" meant an individual; and that although it might bear the sense of issue male if the context required it, there was here no such context; on the contrary, if "eldest son" were so construed the gift over if "he" refused to take the name must also be read "if all issue male" however remote refused—which could not be the intention. As to the gift over "without a son" the V. C. said it was exactly correlative to "eldest son:" it was the same thing whether the testator said "if she die without a son" or "if she die without an eldest son;" since if she die without a son she must die without an eldest son. (*r*)

Devise to "eldest son" held to give an estate tail, on the context.

But in Forsbrook *v.* Forsbrook, (*s*) where a testator declared that his real and personal property should be inherited by his nephews T. F. and C. F. during their lives, and after their death by their eldest sons for their lives, and so on, *the eldest son* of the two families of the name of F. to inherit the aforesaid property forever, and that each two of the succeeding inheritors should inherit the property free from encumbrances; it was held by Lord Cairns and Sir J. Rolt, L.JJ., that the words "and so on, &c. forever" indicated a series of inheritances, and were words of limitation giving estates tail, not to the eldest sons of T. F. and C. F. (for they were expressly made tenants for life), but to T. F. and C. F. by way of remainder after those life estates. That estates of inheri-

(*p*) Since explained in Parker *v.* Tootal, *sup.*

[(*q*) 2 Dr. & Sm. 266. It was held that the sister's first-born son took at his birth a vested fee simple subject to a condition subsequent which was void for remoteness.

(*r*) Cf. Andrew *v.* Andrew, 1 Ch. D. 410, where a gift over "in default of a son" (following a gift to the eldest son) was held to mean a general failure of issue. But Bennett *v.* Bennett is distinguished by the additional event of refusal to take the name of M.

(*s*) L. R., 3 Ch. 93. See also Jenkins *v.* Hughes, 8 H. L. Cas. 571.

tance were intended (it was added) was further shown by the direction respecting encumbrances, which would have been unnecessary if the estates were only for life.

In Lewis *v.* Puxley, (*t*) a testator devised his real estate in the county of P. to his eldest son John, for life, and to *his eldest legitimate son* after his death; and in default of such issue, he gave it *in like manner* to his son Richard; *and in case Richard had no legitimate issue male, then in like manner* to the offspring *about to be born of his (testator's) wife, and in default of such issue, to his own right heirs. And he declared that he made no provision for his son Richard if John lived, because he knew he was otherwise well provided for. It was contended, on the authority of Doe *v.* Charlton, that the devise to John and his eldest son after him, gave John no more than an estate for life, and, on the authority of Goodtitle *v.* Woodhull, (*u*) that this could not be affected by the subsequent expressions in the devise to Richard: but the Court of Exchequer, while allowing the first branch of the argument, rejected the second, and held that the expression "eldest legitimate son" was explained by the subsequent part of the will to be *nomen collectivum*, and gave John an estate tail.

"To A for life, and to his eldest son after his death," held an estate tail in A by force of subsequent devise in tail "in like manner."

But the case may be reversed, and the words "eldest son," or the like, which might otherwise have conferred an estate tail on the parent, may, by a similar argument, be confined to their literal meaning. By such referential expressions the testator is supposed to show the sense in which he understands the preceding devise.] (*x*)

(*t*) 16 M. & Wel. 733.
(*u*) Willes 592.
(*x*) East *v.* Twyford, 9 Hare 713, 4 H. L. Cas. 517, overruling the decision of the Court of Exchequer on the same will, 9 Hare 730, n.]

*CHAPTER XXXIX.

"ISSUE," WHERE CONSTRUED AS A WORD OF LIMITATION.

I. *Devises to a Person and his Issue.—Effect of Words creating a Tenancy in Common,—of Words of Limitation in Fee simple, and other modifying Expressions.*

II. 1. *Devises to A for* Life, with Remainder *to his Issue.—Effect in* these *Cases of* — 2. *Superadded Words of Limitation.* 3. *Words of Distribution and Modification with or without words of Limitation superadded.* 4. *Clear Words of Explanation,—Issue synonymous with Sons and Children.* 5. *Devise over in case of failure of Issue* at the Death.

"Issue" a word of limitation, when.

I.—"Issue" is *nomen collectivum*, and a word of very extensive import. The term embraces descendants of every degree whensoever existent, and, unless restricted by the context, cannot be satisfied by being applied to descendants at a given period. The only mode by which a devise to the issue can be made to run through the whole line of objects comprehended in the term is by construing it as a word of limitation synonymous with *heirs of the body*, by which means the ancestor takes an estate tail;[1] an

1. The word "issue" is a word of limitation—when, Kingsland *v.* Rapelye, 3 Edw. 1; Ogden's Appeal, 70 Penna. St. 501; Earle *v.* Hopkins, 1 Browne App. (Pa.) 55; Paxson *v.* Lefferts, 3 Rawle 59; Kay *v.* Scates, 37 Penna. St. 31; Angle *v.* Brosius, 43 Id. 187; Den *v.* Emans, Penn. (N. J.) 967; James' Claim, 1 Dall. 47; Gibson *v.* McNeely, 11 Ohio St. 131; Powell *v.* Board of Dom. Miss., 49 Penna. St. 46; Kleppner *v.* Laverty, 70 Id. 70; Chelton *v.* Henderson, 9 Gill 432; Bramble *v.* Billups, 4 Leigh 90.

In Powell *v.* Board of Domestic Missions, 49 Penna. St. 46, 53, Strong, J., says: "Undoubtedly in a will the word 'issue' is regarded as primarily a word of limitation, and as synonymous with the technical words 'heirs of the body.' Hence it is presumed that when a testator devises an estate for life, with a remainder to the issue of the devisee of that estate, he intends the remainder-men to take as heirs of the body by descent from their ancestor, rather than as purchasers, themselves the root of a new succession. This intent, however, is but a presumption. Even the strictly technical words 'heirs,' or 'heirs of the body,' may be shown by the context of the will to have been used as merely descriptive of persons, in which case they are regarded as words of purchase and not words of limitation. The intent of the testator to use them in such an abnormal sense, must, indeed, unequivocally appear,

estate capable of comprising in its devolution, though not simultaneously, all the objects embraced by the word "issue" in its largest sense.

but when made thus to appear, it prevails over the legal presumption to the contrary arising from the use of words, which, unexplained, are words of limitation. In regard to this there is no doubt. And it is equally certain that by the same means the word 'issue' may be shown to have been used as a word of purchase, meaning children, grandchildren, &c. Being not strictly a technical word, never a word of limitation except when used in a will, it requires even less to overcome the presumption that a limitation was intended by its use than is demanded to rebut the presumption arising from the use of the words 'heirs of the body.' In Doe d. Cooper *v.* Collis, 4 T. R. 294, Lord Kenyon said: 'In a will, 'issue' is either a word of purchase or of limitation, as will best answer the intention of the devisor, though in the case of a deed it is universally a word of purchase. In Backhouse *v.* Wells, 1 Eq. Ab. 184, p. 27, cited in Fearne on Remainders *105, a devise to one for life *only*, and after his death to the issue male of his body, and to the heirs male of the bodies of such issue, was held to give but an estate for life in the first taker. Here the presumption arising from the use of the word issue was rebutted by the restrictive word *only* attached to the gift of the life estate, and by the fact that words of limitation were added to the devise in the remainder to the issue male. These circumstances would have been entirely insufficient had the devise to the remainder-men been to them by the words 'heirs of the body.'' Upon this case Lord Chancellor Parker remarked that, if the words heirs male had been used instead of issue male, the operation of the law would have been too strong for the intention of the testator. Mr. Smith, also, in his Treatise on Executory Interests, p. 528, asserts that 'there is a less degree of presumption against construing the word issue a word of purchase, than against construing the words heirs of the body to be words of purchase, and a still less degree of presumption against that construction of the word issue, than against the same construction of the word 'heirs' generally; so that, *prima facie*, the word issue is more likely to be a word of purchase than the words heirs of the body, and still more likely than the word 'heirs' generally.' So in Lessee of Findlay *v.* Riddle, 3 Binn. 160, Yeates, J., after remarking that heirs and heirs of the body have been restrained as words of purchase when the same were evidently used in a will in that sense, added, 'they always give way with greater difficulty than the word issue.'"

"The word 'issue,' in a devise, as a word of limitation, is synonymous to heir; it is *nomen collectivum*, and takes in the whole generation." Pennington, J., in Den *v.* Emans, Penn. (N. J.) 967, 971. "If an estate be devised to A, and his heirs, or his heirs and assigns, but if he die without lawful issue, then over to B, * * * the words—'die without lawful issue'—imply an intent in the testator to limit the estate to the lineal or *blood* heirs, as distinguished from the *collateral* heirs of the devisee." Bullock, J., in Arnold *v.* Brown, 7 R. I. 188, 195. "In a deed the term 'issue' is universally a word of purchase. * * * The term may be, and often is, especially in wills, construed as meaning children, where such appears to be the intention of the testator. But such intention must be gathered from the instrument itself." Green, C., in Price *v.* Sisson, 2 Beas. 168, 177. See, also, Daniel *v.* Whartenby, 17 Wall. 639, 645; Hill *v.* Hill, 74 Penna. St. 173; Burleson Bowman, 1 Rich. Eq. 111; Edwards *v.* Bibb, 43 Ala. 666, 672.

In Angle *v.* Brosius, 43 Penna. St. 187,

Opinions certainly have differed as to the signification of the word *issue*. It has been denominated by some judges (*a*) and writers a word of limitation; and a devise to A and his issue has even been stated by an eminent judge as "the aptest way of describing an estate tail according to the statute;" (*b*) by others, "issue" has been called a word of purchase, or an ambiguous word. (*c*) However, it is not from such *dicta* that the true legal acceptation of the word is to be collected, but from the adjudications *fixing its operation*. Unhappily, some discordancy prevails even here, and an examination of the cases will

189, it is said by Strong, J.: "The word 'issue' is well adapted for a word of limitation, having much more aptitude for such an use than it has to designate the objects of a gift. In signification it very nearly resembles the technical phrase 'heirs of the body,' and indeed the two were used as synonymous in the statute *de donis*. Hence it has long been settled that when real estate is devised by one or more limitations in the same will to a person and his issue, the word issue will be construed as a word of limitation, so as to give the ancestor an estate tail unless there are expressions in the will unequivocally indicative of a contrary intention. It may be that less is required to overcome the primary meaning of the word 'issue,' when used in a will than would be necessary to destroy the force of the technical words 'heirs of the body;' but it cannot be regarded as a word of purchase, unless the context clearly shows that the testator intended to use it in the abnormal and restricted sense of children, sons, daughters, &c. * * * What, then, is the effect of the added words 'or heirs' in the devise of the remainder? Certainly not to weaken the force of the words 'legal issue,' and to show that the testatrix intended by them not limitation but personal description. Whatever may be their meaning, it is manifest that the added words are not restrictive. They are strictly words of limitation. They point to no persons. They express only the character in which the remainder-men are to take, and they are the only words which the testatrix has used explanatory of the devise to the legal issue of Samuel C. Ross."

Instead of, and with like force as, the word "issue" are used — "offspring," Bramble *v.* Billups, 4 Leigh 90; Allen *v.* Marble, 31 Penna. St. 117;—"progeny," Bridges *v.* Wilkins, 3 Jones Eq. 342; "descendants," Hamlin *v.* Osgood, 1 Redf. 409; Barstow *v.* Goodwin, 2 Bradf. 413; Baker *v.* Baker, 8 Gray 101; Torrance *v.* Torrance, 4 Md. 11.

In Shreve *v.* Shreve, 43 Md. 382, issue were held to take as purchasers under a devise to children for life, and on the death of either to his issue; so Williams *v.* Angell, 7 R. I. 145. So to sisters "and their issue," Bridges *v.* Wilkins, 3 Jones Eq. 342. So to A for life, and after her death to the lawful issue of her body, which should be living at her death, Smith *v.* Coyle, 83 Penna. St. 242; or in case of A's death leaving lawful issue to such issue, Day's Estate, 33 Leg. Int. 228.

[(*a*) See per Parke, B., 15 M. & Wels. 272; Roddy *v.* Fitzgerald, 6 H. L. Cas. 823.]

(*b*) Per Lord Thurlow, in Hockley *v.* Mawbey, 1 Ves., Jr., 149.

(*c*) See judgment in Ginger d. White *v.* White, Willes 348; Roe d. Dodson *v.* Grew, 2 Wils. 324; Doe d. Cooper *v.* Collis, 4 T. R. 299; Earl of Oxford *v.* Churchill, 3 Ves. & B. 67; Lyon *v.* Mitchell, 1 Mad. 473; Tate *v.* Clarke, 1 Beav. 105; Doe d. Gallini *v.* Gallini, 3 Ad. & Ell. 340.

serve to evince that, in the enuncia*tion of any general proposition on the subject, the utmost caution is requisite. [According to the latest decisions, however, "issue" is *prima facie* a word of limitation, equivalent to "heirs of the body," [2] but more flexible than these and more easily restricted in its meaning by the context.] (*d*)

With regard to a devise simply to a person and his issue, no doubt can at this day be raised as to its conferring an estate tail; and it may be observed that such a devise is not (like a devise to a person and his children) (*e*) dependent on, or, it seems, in the least degree influenced by the fact of there being or not being issue of the devisee living at the date of the will, or at any other period. (*f*) Upon the same principle as that on which, in the cases just referred to, the devisee is held to be tenant in tail where the property can reach the children in no other way, he is here construed to take an estate tail at all events, namely, because there is no other mode by which the testator's bounty can be made to flow to and embrace the whole range of intended objects. [3]

Devise to A and his issue simply gives estate tail.

[So a devise to several persons and their issue, (*g*) or to a class and their issue, (*h*) confers an estate tail.]

So, to a class and their issue.

2. *Contra*, Baker *v.* Scott, 62 Ill. 86, 93.

[(*d*) Per Wood, V. C., Kay 24, 1 K. & J. 362. See also Bradley *v.* Cartwright, L. R., 2 C. P. 511.]

(*e*) *Ante* p. *389.

(*f*) Hale, C. J., in King *v.* Melling, 1 Vent. 231, says, "though the word children may be *made nomen collectivum*, the word issue *is nomen collectivum* of itself." [See S. C., 2 Lev. 58, 3 Keb. 95. This *dictum* seems to refer only to issue when taking expressly by way of remainder: for, after stating the effect of a devise to B and the issue of his body (B having no issue at the time) to be an estate tail, the C. J. adds, "I agree it would be otherwise if there were issue at that time." However (as Lord Hardwicke said, 3 Atk. 396) Wild's Case was decided before it was fully settled that "issue" was as proper a word of limitation as "heirs of the body;" and in Martin *v.* Swannell, 2 Beav. 249, the question whether there was issue or not at the time of the devise appears to have been thought immaterial, since it was not adverted to.

3. Den *v.* Emans, Penn. (N. J.) 967; Kay *v.* Scates, 37 Penna. St. 31; James' Claim, 1 Dall. 47; Angle *v.* Brosius, 43 Penna. St. 187; Paxson *v.* Lefferts, 3 Rawle 59; Gibson *v.* McNeely, 11 Ohio St. 131; Powell *v.* Board of Dom. Miss., 49 Penna. St. 46.

(*g*) Parkin *v.* Knight, 15 Sim. 83: the gift was to several *or* their issue, and "or" was read "and."

(*h*) Beaver *v.* Nowell, 25 Beav. 551; Campbell *v.* Bouskell, 27 Beav. 325.]

To A and his next or eldest issue male.—It seems extremely probable that a devise to A and his *next* or *eldest* issue male would now be held to give an estate tail male, though the contrary was decided in the early case of Lovelace *v.* Lovelace, Cro. El. 40, which cannot be reconciled with later cases, especially Doe *v.* Garrod, 2 B. & Ad. 87, *ante* p. *403. That a devise to A and his *next* or *eldest* heir confers an estate tail, *vide sup.*

It has even been held that a devise to A and his issue *living at his death* creates an estate tail in A. (*i*) In such a case it is clear the issue cannot take as joint tenants with him, since the objects are not ascertainable until the death of the parent. It is only through him that they can become entitled, and the *case falls, therefore, within the principle of the rule in Wild's Case, namely, that the parent must take an estate tail in order to let in the other objects. Had the devise been to A for life *with remainder* to the issue living at his death, the case might have been different. (*k*) All the objects might then have taken by purchase; (*l*) [but even then, under a will made before 1838, the issue would have taken only estates for life; whereas if the ancestor has an estate tail the issue has at least the chance of acquiring the inheritance by descent.] (*m*)

To A and his issue *living at his death*, held an estate tail.

So far the cases present little that can be the subject of controversy; but difficulty frequently arises from the introduction into the devise of expressions inconsistent with the course of devolution or enjoyment under an estate tail, as, that the issue shall take in equal shares, or *as tenants in common*, or that the estate shall go *over in case they die under twenty-one*, which

Effects of words of modification inconsistent with an estate tail.

p. *326. But since Lees *v.* Mosley, 1 Y. & C. 589, stated *post*, establishing the greater inflexibility of limitations to heirs of the body than limitations to issue, this must not be considered conclusive.

(*i*) University of Oxford *v.* Clifton, 1 Ed. 473. [And see Jenkins *v.* Hughes, 3 H. L. Cas. 571, 585.]

(*k*) See Lethieullier *v.* Tracy, 3 Atk. 774, 784, 796, Amb. 204, 220, 1 Ken. 56.

(*l*) Considering the inclination manifested in some of the cases to construe a devise to a person and his children as amounting to a devise to A for life, with remainder to his children, (*ante* pp. *394, *398,) perhaps the reader will not be disposed to place implicit confidence in the adjudication that a devise to A and his issue living at his decease gives to A an estate tail. There would seem to be less difficulty in such a case in reading the gift to the issue as a remainder than in that of a devise to A and his children. Such a remainder, though contingent, would not now be destructible during the life of A. At all events, there can scarcely be a doubt that the words in question applied to *personal* estate, would be construed in the manner suggested, namely, as giving a life interest to A, with a contingent disposition of the ulterior interest to the issue living at his death; [and this seems to have been Lord Hardwicke's construction in Lampley *v.* Blower, 3 Atk. 396, where he held that the gift over on death without *leaving* issue explained the word issue in the gift "to Francis and Ann each one-half, and to their issue," to mean such issue as was left at the time of the death. He denied that the issue took jointly with the parent, while at the same time he decided that there was no lapse, which there would have been if "issue" had been taken as a word of limitation.

(*m*) See Shaw *v.* Weigh, Crozier *v.* Crozier, and Kavanagh *v.* Morland, stated *post*.]

has been regarded as inapplicable to issue indefinitely. If the courts had uniformly rejected these inconsistent provisions as repugnant, immense litigation and discordancy of decision would have been prevented. This has been shown to be now the established rule in regard to limitations to *heirs of the body;* (n) and there might seem, upon principle, to be strong ground to contend for the application of the same doctrine to the cases under consideration. The word *issue* is not less extensive in its import than heirs of the body: it embraces the whole line of lineal descendants; it is used in the statute *de donis,* (o) in some instances at least synonymously with heirs of the body, and the cases are very numerous in which it has been held to create an estate tail. It will be seen, however, that, in some instances, *the word *issue* has been diverted from its general legal acceptation by the occurrence of words of distribution, or other expressions which point at a mode of devolution or enjoyment inconsistent with an estate tail, and which have been decided to be insufficient to convert the term *heirs of the body* into children, or to prevent its conferring an estate tail.

Some confusion arises in the cases from the neglect to distinguish between a devise to A and his issue in one unbroken limitation, and a devise to A *for life* and *after his death* to his issue. It is true they both converge to the same point, when *issue* is construed a word of limitation; but if, on the other hand, the issue are held to be purchasers, they must, it is conceived, take differently in the two cases; in the former *jointly with the parent,* in the latter *by way of remainder* after him; though certainly, in some of the cases, this distinction has been overlooked, and the courts have shown a readiness, even where the devise is to a person and his issue, not only to read "issue" as a word of purchase, on account of words of modification inconsistent with an estate tail being found in the devise, but to hold the issue to take by way of remainder expectant on the estate for life of the ancestor.

To A and his issue, *as tenants in common,* but in default of such issue, *or in case they should die under twenty-one,* over.

Thus, in Doe d. Davy *v.* Burnsall, (p) where a testator devised freehold and leasehold *estates to M. and the issue of her body* lawfully to be begotton *as tenants in common* (if more than one), but in default of such issue, or, living such, if they *should all die under the age of twenty-one years,* and without leaving lawful issue of any of their bodies, then over to A; M., before the birth of a child,

(n) *Ante* p. *363.
(o) 13 Edw. I., c. 1.
(p) 6 T. R. 30.

suffered a recovery. It was held by the Court of K. B., that M. took for life, with remainder in fee to her children if she had any; but if she had none, or they died under twenty-one and without leaving lawful issue, then over; and that this remainder, therefore, being contingent, was barred by the recovery of M. The same devise afterwards came before the Court of C. P., (q) on a case from chancery; and that court certified that M. took only an estate for life, (r) with contingent remainders over. Eyre, C. J., said, "If it were not for the words 'if they shall all die under the age of twenty-one years,' I should be of opinion that this must be construed to be an estate for life in M., remainder in tail to her issue as purchasers, with cross remainders to every one of that family, and then *over; but I am at a loss to know what to do with these words. If I were perfectly satisfied with the rejection of the word 'amongst' in Doe v. Applin, (s) I would reject them, and consider this as a devise over in case the issue of M. should die without leaving lawful issue of their bodies." (t)

To H. and his issue, his, her or their heirs, *equally to be divided.*

So, in Doe d. Gilman v. Elvey, (u) where a testator devised his real estate to his wife for life, and after her decease to his son H. *and to the issue of his body* lawfully begotten or to be begotten *his, her or their heirs, equally to be divided if more than one;* and if H. should have no issue of his body lawfully begotten living at his decease, then to A in fee. H. survived the testator's widow, and before he had any issue, suffered a recovery. The court considered the case as falling exactly within Doe v. Burnsall, the devise being in effect to the issue as tenants in common. It was held, however, that whether H. took for life or in tail, the title under the recovery was good; the remainders in the former case being contingent, and consequently destroyed by it.

Of these two cases it may be observed that they *decided* nothing

(q) Burnsall v. Davy, 1 B. & P. 215.

(r) The certificate does not state who were entitled under the contingent remainders, the case not embracing that point.

(s) 4 T. R. 82, *post.*

(t) It is evident that the word *issue* in this passage of the judgment is used in two senses, differing in comprehensiveness; for if used as *nomen generalissimum* in regard to the issue of M., it is clear that such issue could never fail without involving the failure of the issue of such issue. To render the sentence intelligible, we must suppose the learned judge to mean, in the first instance, either issue of a given class or issue existent within a given period, *i. e.*, either children or all issue born in the lifetime of the tenant for life, probably the latter.

(u) 4 East 313.

more than that A's estate was *either* a contingent remainder after an estate for life, *or* a vested remainder after an estate tail, either of which was defeated by the recovery. The opinion of the court upon the alternative of these propositions can hardly be considered as an *adjudication* on the point here discussed.

Remarks on Doe v. Burnsall, and Doe v. Elvey.

As there was no issue of the devisee at the time of the devise taking effect, the testator's bounty could only be made to reach the issue (assuming that word to be intended for a word of purchase), under the joint devise to them and their parent, by giving him an estate tail, unless the gift to the issue were construed as a remainder, which the court undoubtedly seemed inclined to do; but it is difficult to reconcile such a construction with the principle of the cases establishing that even a devise *to* A *and his children* must, under such circumstances, be construed an estate tail in order to let in the children. (x) *If the children could be treated as taking by way of remainder, there is no necessity for having recourse to such a rule. If in such cases the court is authorized to turn the devise to the issue into a remainder, the cases treated of in the present section cease to exist as a distinct class, and become blended with those which form the subject of the next section. The authorities, however, do not warrant any such conclusion, as the two preceding cases are, for the reason already stated, scarcely to be regarded as adjudications on the point, and are unsupported by any subsequent cases. Indeed, in the only case that has since occurred, in which the devise to the issue was concurrent with that to the ancestor, and not by way of remainder, the devisee was held to take an estate tail, although words of limitation in fee were superadded.[4] The case here referred to is Franklin v. Lay, (y) where a testator devised to his grandson J., and to the issue of his body lawfully to be begotten *and to the heirs of such issue forever*, chargeable with a mortgage; but, if his said grandson J. should die without leaving any issue of his body lawfully begotten, then over; Sir J. Leach, V. C., held it to be an estate tail in J.; observing that the words "dying without leaving issue" might of course be restrained by other expressions in the will

To A and to his issue, and to the *heirs* of such issue.

(x) Wild's Case, 6 Co. 17; Davie v. Stevens, Doug. 321; Seale v. Barter, 2 B. & P. 486, *ante* p. *390.

4. But where estates tail have been abolished by statute, the estate would be a fee in the first taker, Gonzales v. Barton, 45 Ind. 295; Bramble v. Billups, 4 Leigh 90.

(y) 6 Mad. 258, 2 Bli. 59, n.

to issue living at the death; as the general words "in default of issue" might also be, *but not by words of limitation superadded to the issue.*

Although there seems to be considerable difficulty in reading a devise to A and his issue, as a devise to A for life with remainder to his issue, even when accompanied with expressions pointing at a mode of enjoyment inconsistent with an estate tail; yet it is not denied that a slight indication of intention in the context would be sufficient to induce such a construction, and the devise would then be brought within the scope of the authorities discussed under the next division.

II.—1. We come now to the consideration of those cases in which a devise to A *for life*, and after his death to his issue, becomes, by the operation of the rule in Shelley's Case, (z) an estate tail.

To A for life, *remainder* to the issue of his body, held an estate tail.

One of the earliest cases of this kind is King *v.* Melling, (a) where a testator devised lands to A *for life*, and after his *decease he gave the same *to the issue of his body* lawfully begotten on a second wife; and for want of such issue to B and his heirs forever, provided that A might make a jointure of the premises to such second wife, which she might enjoy for her life. Twisden and Rainsford, JJ., held it to be an estate for life in A, in opposition to Hale, C. J., who delivered an elaborate and argumentative opinion in favor of an estate tail, which construction was afterwards adopted by all the judges in the Exchequer Chamber, reversing the judgment of the K. B.

To A and D for their lives; if either die leaving issue, then to such issue; held an estate tail.

So, in Shaw *v.* Weigh, (b) where the testator devised lands to his wife for life, and after her decease in trust for his sisters A and D, equally betwixt them *during their natural lives*, without committing any manner of waste, and if either of his sisters happened to die *leaving issue or issues of her or their bodies* lawfully begotten, then in trust *for such issue or issues* of the mother's share, or else in trust for the survivor or survivors of them, and their respective issue or issues; and if it should happen that both his said sisters died without issue as aforesaid, *and their issue or issues to die without issue lawfully to be begotten*, (c)

(z) *Ante* p. *332.

(a) 1 Vent. 225, 232, 2 Lev. 58, 61. See also Taylor *v.* Sayer, Cro. El. 742; [Jordan *v.* Lowe, 6 Beav. 350.]

(b) 2 Stra. 798, 1 Barn. B. R. 54, 1 Eq. Cas. Ab. 184, pl. 28, 3 B. P. C. Toml. 120. [*Vide ante* p. *385, n.]

(c) As these words would raise an implied gift in the issue of the issue, the case may be classed with those in which words of limitation in tail are superadded to the devise to the issue. See also Franks *v.* Price, 3 Beav. 182, *post.*

then over. The chief question was whether this was an estate for life, or an estate tail in the sisters. It was adjudged in D. P. (affirming a judgment of the Court of Great Sessions for Flintshire, which had been reversed in B. R.), that the devise created an estate tail. (*d*)

In Ginger *v.* White, (*e*) Willes, C. J., questioned this decision; but subsequent cases have placed its authority beyond all doubt. (*f*)

[In Haddelsey *v.* Adams, (*g*) the devise was to the testator's four granddaughters as tenants in common for life, with benefit of survivorship, the remainder to trustees and their heirs upon trust to support the contingent remainders thereinafter limited, remainder to the issue male of the granddaughters successively lawfully to be begotten, and in default of such issue to the testator's right heirs forever. Sir J. Romilly, M. R., held that the granddaughters took estates tail.]

*II.—2. It is clear, too, that *issue* is not converted into a word of purchase by the addition of words of limitation, descriptive of heirs of the same species as the issue described. (*h*) Thus, in Roe d. Dodson *v.* Grew, (*i*) where a testator devised unto his nephew G. for his natural life, and after his decease to the use of the *male issue of his body* lawfully to be begotten and the *heirs male of the body of such issue male*, and for want of such male issue, then over; the Court of C. P. held that G. took an estate tail. Wilmot, C. J., said that the intention certainly was to give G. an estate for life only; but the intention also was that as long as he had any issue male the estate should not go over; (*k*) and if we balance the two intentions, the weightier is that all the sons of G. should take in succession. Clive, J., said too great a regard had been paid to the superadded words "heirs male of the body of such heirs male." Bathurst, J., laid it down as a rule, that where the ancestor takes an estate of freehold, if the word "issue" in a will comes after, it is a word of limitation. Gould, J., observed that the word is used in the statute *de donis* promiscuously with the

Effect of words of limitation superadded.

To the *heirs male* of the body of such issue male.

[(*d*) This seems to have been one of those cases where lay lords voted on a question of law and decided it against the opinions of a majority of the judges, only three of whom held it an estate tail, and nine an estate for life.]

(*e*) Willes 359, *post*.

(*f*) See cases *passim* in the sequel of this chapter.

[(*g*) 22 Beav. 266.]

(*h*) See same rule as to heirs of the body, *ante* p. *359.

(*i*) 2 Wils. 322; better reported Wilm. 272. See also Shaw *v.* Weigh, in the text.

(*k*) Or rather that the issue should take it.

word "heirs;" *that the term "issue" comprehends the whole generation as well as the word "heirs"* (of the body), and, in his judgment, the word "issue" was more properly a word of limitation than a word of purchase.

To the *heirs male of the body* of the issue male.

This case (which has always been regarded as a leading authority) seems to have overruled Backhouse *v.* Wells, (*l*) where the devise being to J. *for his life only*, without impeachment of waste, and after his decease then *to the issue male of his body* lawfully to be begotten, if God should bless him with any, *and to the heirs male of the body of such issue* lawfully begotten; and for default of such issue, over; it was adjudged that J. took an estate *for life*, and that the limitation to the issue was a description of the person who was to take the estate tail.

Observations upon Roe *v.* Grew and Backhouse *v.* Wells.

It would be idle to attempt to distinguish Backhouse *v.* Wells from Roe *v.* Grew, on the ground of the words "only," and "without impeachment of waste," and "if God shall bless him with any." The first two expressions merely show that the testator intended to confer an estate for life, and nothing more, *which sufficiently appeared by the express limitation for life, and the last words are obviously implied in every gift of this nature.

The authority of Roe *v.* Grew has been confirmed by Hodgson *v.* Merest, where the devise was to A for the term of his natural life, and, after his decease, then to the issue of his body, and to the heirs of the body of such issue, with remainders over; and it was held that A took an estate tail. (*m*)

Superadded limitation to the heirs *general* of the issue.

It is also established that the addition of a limitation to the heirs *general* of the issue will not prevent the word "issue" from operating to give an estate tail as a word of limitation.[5] (*n*) This position, indeed, may appear to be encountered by the well-known case of Loddington *v.*

(*l*) 1 Eq. Cas. Ab. 184, pl. 27, Fort. 133. [It has been suggested by Sir E. Sugden, 3 Jo. & Lat. 57, that the court may have considered the word "issue" as used in the singular number, on the ground that, according to 10 Mod. 181, the remainder was "to the heirs male of *that* issue." As to "issue" in the singular, see below, p. *419.]

(*m*) 9 Price 556. [So stated in marginal note only. See also Irwin *v.* Cuff, Hayes 30; with which compare Hockley *v.* Mawbey, 1 Ves., Jr., 143, *post*.]

5. 4 Kent 221. But in some of the

(*n*) See same rule as to heirs of the body, *ante* p. *360.

Kime, (o) where under a devise to A *for life* without impeachment of waste, and in case he should have any issue male, then *to such issue male and his heirs forever*, [and if *he* die without issue male, then to B and his heirs,] it was held that A took an estate *for life only*, with a contingent fee to his issue male.

A for life, remainder to issue male and *his* heirs, and if *he* die, over.

It will require some very fine-spun distinctions to reconcile this case with subsequent decisions. In King *v.* Burchell (p) the testator devised [his houses at Maidstone] to J. *for his life*, and after the determination of that estate unto *the issue male of the body of* J. lawfully to be begotten *and to their heirs*, and, for want of such issue, over; and if J. or his issue should alien the premises they were charged with £2000; Lord Keeper Henley held that J. was tenant in tail, and that the proviso was repugnant and void: he distinguished Loddington *v.* Kime because there the remainder was expressly contingent; [and because the word "his" was used instead of the word "their" in the limitation to the heirs of the issue, whereby it appeared that one particular person was pointed at, and that all the issue were not intended to take. This force of the word "his" is noticed by Lord Raymond in Goodright *v.* Pullyn, (q) where, how-

To A for life, remainder to his issue male and *their heirs*, held estate tail in A.

Loddington *v.* Kime distinguished by Henley, L. K.

American states, at least, it is held that the decision in Loddington *v.* Kime has not been overruled, and that the superadded words of limitation will change the word "issue" into a word of purchase, Shreve *v.* Shreve, 43 Md. 382; Lyles *v.* Diggs, 6 Harr. & J. 364; Chelton *v.* Henderson, 9 Gill 432; Simpers *v.* Simpers, 15 Md. 191, note; Findlay *v.* Riddle, 3 Binn. 139; Way *v.* Gest, 14 Serg. & R. 40.

"In the case now to be decided, there are words superadded to the word issue, quite sufficient to give to them the inheritance; and the law is that 'where an estate is devised to a person for life, with remainder to his *issue*, with words of limitation superadded, the word issue will, in that case, be construed to be a word of purchase,'" Magruder, J., in Chelton *v.* Henderson, as a note to Simpers *v.* Simpers, *ubi supra*. "In that will there were words superadded to the word issue, sufficient to give to the issue the inheritance without enlarging the life estate given to the first taker, and in such a case, there is authority for construing the word *issue* as a word of purchase," Bartol, J., in Simpers *v.* Simpers, 15 Md. 160, 190.

(o) 1 Salk. 224, Ld. Raym. 203, [3 B. P. C. Toml. 64, *nom.* Barnardiston *v.* Carter.]

(p) 1 Ed. 424, Amb. 379. [The devise here referred to is the second one in the will, namely, of the Maidstone estate. The case, so far as it relates to the first devise, properly belongs to the next division of this section. No distinction was taken between the two, though, as we shall hereafter see, they would now be considered to have different effects.

(q) 2 Stra. 731, stated *ante* p. *360. And see per Sir E. Sugden, 3 Jo. & Lat. 57, cited above, n. (l).]

ever, he *referred the word to the ancestor. If Loddington *v.* Kime is referable to these special grounds, it is not opposed to the position above laid down. As to the other] distinction taken by the Lord Keeper, it may be asked, is not every remainder to a class contingent in this sense, namely, as respects the event of there being objects to claim under it. Upon this principle, Sir W. Grant, in Elton *v.* Eason, (*r*) held that the words "if any," annexed to a limitation to the heirs of the body, did not vary the construction. It is futile, therefore, to attempt to preserve Loddington *v.* Kime by any such distinction.

Remark on Loddington v. Kime.

Another decision which may seem to militate against the rule before laid down is Doe d. Cooper *v.* Collis, (*s*) where a testator devised to his daughter E., and to S. the wife of W., to be equally divided between them, not as joint tenants but as tenants in common, viz., the one moiety to E. and her heirs forever, and the other moiety to S. for the term of *her natural life*, and after her decease *to the issue of her body* lawfully begotten *and their heirs* forever. There was no devise over. The question was whether S. took an *estate tail* or an estate for *her life*, with remainder in fee to her children; (*t*) and the court decided in favor of the latter construction, Lord Kenyon observing that issue was either a word of purchase or of limitation, as would best answer the intent of the devisor; and he remarked that the property was *to be equally divided*, which it would not be if S. were held to take an estate tail; for, in that case, the reversion in fee of that moiety would be again subdivided between the heirs of the two daughters.

To S. for life, remainder to her issue and *their heirs*, held estate for life in S.

It is difficult to accede to the reasoning which ascribed to the words of division this influence on the construction, since they were merely applied to the *corpus* of the land, not to the inheritance. At all events, it is enough for our present purpose to show that the case was decided upon special grounds, and not in opposition to the doctrine that a limitation to the heirs of the issue superadded to the devise to the "issue" is inoperative to vary the construc-

Remark on Doe v. Collis.

(*r*) 19 Ves. 73. [See also Marshall *v.* Grime, 28 Beav. 375.]

(*s*) 4 T. R. 294.

[(*t*) This case is not an authority that "issue" in such a limitation is to be read "children," for it does not appear that there were any other issue who could have taken; it is most probable there were not, as the eldest child was only sixteen when S. levied a fine *sur conusance*, &c.]

tion. As such, indeed, it would have been clearly overruled by subsequent cases.

Thus, in Denn d. Webb *v.* Puckey (*u*) the testator devised to his grandson N. *for life* without impeachment of waste, and *after his decease *to the issue male of his body* lawfully begotten and *to the heirs and assigns of such issue male forever;* and in default of *such* issue male, then over. N. suffered a recovery, and the question raised was whether, under the devise, he was tenant in tail or tenant for life only. The court held that the general intent of the testator was that the male descendants of his grandson N. should take the estate, and that none of those to whom the subsequent limitations were given should take until all such male descendants were extinct, and to effectuate this it was necessary to give him an estate tail; for if his issue took by purchase, Lord Kenyon thought it would be difficult to extend it to more than one, (*x*) and that even if the words comprehended all the male issue as tenants in common in tail, yet that would not have answered the devisor's intention, because there were no words to create cross remainders between them. (*y*) But it was held, even if the issue would have taken by purchase, yet that, being a contingent remainder, it was destroyed by the recovery which was suffered before the birth of issue, so that the defendant, who claimed under the recovery, was entitled *quacunque via data.* (*z*)

To A for life, remainder to his issue and to the *heirs and assigns* of such issue, held an estate tail in A.

So, in Frank *v.* Stovin, (*a*) where a testator devised to B *for life* without impeachment of waste, with power to make a jointure to any future wife, and after his decease then *to*

To B for life, remainder to his issue male

(*u*) 5 T. R. 299.

(*x*) He is made to say, "It has been contended that N. took only an estate for life; if so, what estate was given by the words, 'to the issue male of his body lawfully begotten, and the heirs and assigns of such issue male?' Was it to extend to more than one son? It would be difficult to extend it to more than one, and I conceive that the eldest must have taken the *absolute interest in the estate.* But that would have defeated the devisor's intention, because if it had *descended* (*qu.* devolved?) to that one son, and he had died without making any disposition of it, it would have gone over to the other sons of the devisor," *i. e.*, by descent, for if it were a devise in fee to the son, of course no remainder could be limited on that estate.

(*y*) They would clearly have been implied, but there seem to have been insuperable obstacles to the suggested construction.

[(*z*) Since 8 and 9 Vict., c. 106, § 8, no act of the tenant for life before issue born can now destroy subsequent contingent remainders. See ch. XXVI.]

(*a*) 3 East 548. [See also Sturge *v.* Sturge, 12 Beav. 230.

and their heirs, held an estate tail.

the use of the issue male of the body of B lawfully begotten and to be begotten *and their heirs;* and in default of such issue, then over. B had issue, and afterwards suffered a recovery. Lord Ellenborough was of opinion that the case was governed by Roe *v.* Grew, and accordingly that B took an estate tail.

[And if the addition of formal words of inheritance will not prevent the word issue from operating as a word of limitation, still less (*b*) will informal words do so though sufficient *to carry the inheritance, such as "all my interest" (*c*) or "forever."] (*d*)

Effect of limitation over "in default of such issue."

It should be observed that in Frank *v.* Stovin (*e*) Le Blanc, J., made a distinction between that case and Denn *v.* Puckey (*f*) and the case of Doe *v.* Collis, (*g*) by reason of the limitation over "in default of such issue," which occurred in those cases. [This distinction has been the subject of much discussion. On the one hand reference is made] to the cases discussed in the next chapter establishing that this expression, following a devise to any class of issue refers to those objects; [and it is argued that] if in the case of a devise to sons or children, and in default of such issue over, the clause introducing the devise over is inoperative to vary the construction of the prior devise, how can it have more power where following an express devise to issue explained by the context to mean sons or children? The two cases [it is said] are identical in principle: and to say that the words "in default of such issue" refer to the objects of the prior devise, whoever they may be, and that those objects mean issue indefinitely by the effect of the words in question, seems very much like reasoning in a circle. (*h*) [The answer is, that when it is a question whether the general term "issue" is or is not explained

(*b*) See Fuller *v.* Chamier, L. R., 2 Eq. 682, *ante* p. *328.

(*c*) Manning *v.* Moore, Alc. & Nap. 96.

(*d*) Griffiths *v.* Evan, 5 Beav. 241.]

(*e*) 3 East 551.

(*f*) *Ante* p. *420.

(*g*) Ib.

[(*h*) The argument is Mr. Jarman's, who concluded that,] if in Doe *v.* Collis "issue" was properly construed to mean children, the words "in default of *such* issue" in Denn *v.* Puckey and Frank *v.* Stovin ought, according to the class of cases just mentioned, to have been read in default of such *children:* but that as they were not so construed it followed that Doe *v.* Collis, as far as it rested on this distinction, was overruled. [The whole argument was obviously directed against Lord Kenyon's method of dealing with these cases, *viz.*, first inferring from the superadded words of limitation or distribution, without taking into account the gift over in default of issue, that "issue" was used for "children" (which he called the particular intent,) and then sacrificing that in order to give effect to the "general intent," which he inferred from the gift over in default of issue: see further ch. XL., § 3, subs. 4.

by the context to mean children, the *whole* context must be taken into account, and that it is no more permissible to exclude the words "in default of such issue" from consideration than any other part of the context. Nearly every judge who has had to construe a devise to issue, and has found such a clause in the will, has expressly relied on it as one ground for giving the ancestor an estate tail; and in Woodhouse *v.* Herrick (*i*) Sir W. P. Wood distinctly asserted its importance as a material part of the context. Of course its absence is not conclusive in favor of construing "issue" as a word of pur*chase, and falls far short of reconciling Doe *v.* Collis with other authorities, which have established that] a devise to A for life, remainder to his issue and the heirs of such issue with or without a limitation over, confers an estate tail on A. (*k*) [Lord St. Leonards is sometimes cited as if he had laid down a contrary rule: but what he says is "a devise to A for life, with remainder to his issue, with superadded words of limitation *in a manner inconsistent with a descent from A* will give the word issue the operation of a word of purchase." (*l*)

But, as already shown, (*m*) if the superadded words of limitation narrow the course of descent, they convert even "heirs of the body" into words of purchase, since "it is absolutely impossible by any implied qualification to reconcile the superadded words to those preceding them, so as to satisfy both by construing the first as words of limitation." (*n*) This principle appears to be equally applicable where the prior word is "issue." 6 In Hamilton *v.* West, (*o*) where there was a devise to A for life, with remainder to her first and other sons in tail male, with remainder "to the issue female of the said A and the *heirs of their bodies*, with remainder over: it was held, by Smith, M. R., Ir., that A did not take an estate in tail female expectant on the estates tail of her first and other sons, but that the daughters of A took estates in tail general by purchase, the limitation to the heirs general of the bodies of the issue being inconsistent with an estate in tail female in the ancestor.

Superadded words of limitation which change the course of descent.

To A for life, with remainder to her issue female and the heirs of their bodies.

(*i*) 1 K. & J. 352, stated below.

(*k*) See acc. per Lord Cranworth, Parker *v.* Clarke, 6 D., M. & G. 109]; Hayes, Inq. 302. [Cf. Phillips *v.* James, 2 Dr. & Sm. 404, 3 D., J. & S. 72 (executory articles for settlement.)

(*l*) Montgomery *v.* Montgomery, 3 Jo. & Lat. 57, stated below.

(*m*) *Ante* p. *362.

(*n*) Fea. C. R. 183.]

6. Davis *v.* Whartenby, 17 Wall. 639.

[(*o*) 10 Ir. Eq. Rep. 75.

Here, it will be observed, the superadded words of limitation (heirs of the body) were more extensive than those upon which they were engrafted (issue *female*), and might have been satisfied in a qualified sense without attributing to them the effect of changing the course of descent; just as in the case of a devise to A for life, remainder to his issue or to the heirs of his body *and their heirs general*, in which case "issue" is a word of limitation notwithstanding the superadded words, the reason given being that "the superadded words are not contrary to or incompatible with the preceding, but in their general sense include them; and there is no improbability in the supposition that they were used *in the same qualified sense as the preceding; and then both may be satisfied by taking the first as words of limitation." (q) However, this construction does not appear to have been applied in any decided case where the superadded words indicate a special course of descent, less general than one in fee simple; and it is not improbable that the doctrine of Hamilton *v.* West will be supported as well where the preceding words are "male" or "female heirs of the body" as where the more flexible term "issue" is used.]

Words of modification inconsistent with an estate tail.

II.—3. It might seem upon principle to follow that words of distribution annexed to the devise to the issue, or any other expressions prescribing a mode of enjoyment inconsistent with the course of descent under an estate tail, would be no less inoperative than superadded words of limitation to turn "*issue*" into a word of designation; and such undoubtedly is the doctrine of *some* at least of the cases.

Devise of estate to W. for life, remainder to *and amongst* his issue, and in default of issue, over, held an estate tail.

Thus, in Doe d. Blandford *v.* Applin, (r) where a testator devised an estate at A to W. for life, and after his decease *to and amongst his issue*, and in default of issue, over; it was held that W. took an *estate tail:* Lord Kenyon and Buller, J., reasoned much on the words limiting over the property, and the latter admitted that in rejecting the words "and amongst," they went beyond any of the pre-

(q) Fearne C. R. 184, *ante* p. *363.]

(r) 4 T. R. 82; and see 8 T. R. 8, n. [See also King *v.* Burchell, 1 Ed. 424, 4 T. R. 296, n., 3 T. R. 145, n., Amb. 379, Serj. Hill's MSS., vol. V., pp. 522, 633, and Fearne C. R. 164. But it is not easy to collect from these different reports whether Lord Henley's opinion in favor of an estate tail referred to the devise of the Hunton estate (in which both words of distribution and words of limitation were superadded to the gift to the issue of J. H.) If it did, it is in point on the question discussed in this section. It was

ceding cases. Grose, J., referred the decision to the broad (and, it is conceived, the true) ground, that the word *issue* was a word of limitation, and different from *children*, citing the declaration of Rainsford, J., (s) "that the word issue is *ex vi termini nomen collectivum*, and takes in all issues to the utmost extent of the family, *as far as the words heirs of the body would do.*"

The authority of Doe *v.* Applin was denied by Eyre, C. J., in *Burnsall *v.* Davy (t) and [doubted] by Lord [Loughborough], in Jacobs *v.* Amyatt, (u) but it is now indisputable. (x) The fact that Lord [Loughborough,] in deciding Jacobs *v.* Amyatt, [where the words used were "heirs of the body,"] found it necessary to question Doe *v.* Applin, shows that he saw no distinction between devises to *heirs of the body* and *issue*, in regard to the effect of superadded expressions.

Remark on Doe v. Applin.

So, in Doe d. Cock *v.* Cooper, (y) where a testator devised lands to his nephew R. for the term only of his natural life, and after his decease he devised the same to the *lawful issue* of R. *as tenants in common;* but in case R. should die without leaving lawful issue, then after his decease the testator devised the lands to G. in fee. It was held that R. took an estate tail, to accomplish the general intention, and by implication from the words devising over the property in case R. should die without issue. (z) In this case, even if the issue took as purchasers, the contingent remainder to them had been destroyed by a recovery suffered by R.; but the court decided the case unreservedly on the other point. 7

To R. for life, remainder to his issue *as tenants in common*, with devise over in default of issue, held an estate tail.

so treated by Wood, V. C., in Woodhouse *v.* Herrick, 1 K. & J. 352, stated *post*, and by Sir E. Sugden in Montgomery *v.* Montgomery, 3 Jo. & Lat. 58, 59, and questioned by both those judges. But it may be observed that, whatever the weight due to an opinion of Lord Henley, the case did not require a decision of the question, the decree dismissing the bill being amply warranted by the illegality of the proviso upon which the plaintiff's claim was founded, see per Lord Loughborough, Jacobs *v.* Amyatt, 13 Ves. 481, n., and per Sir E. Sugden, *ubi sup.*]

(s) Finch 282.

(t) 1 B. & P. 215, *ante* p. *414.

(u) 4 B. C. C. 542, [13 Ves. 479, n., *post* ch. XLIV., (personalty.)

(x) Except when viewed with relation to the distinction introduced by later cases, (see *post*,) that as the devise was of "an estate," the issue taking by purchase might have taken the fee, and therefore the ancestor ought to have taken only for life.]

(y) 1 East 229.

(z) Notwithstanding that Mr. Justice Grose, in Doe *v.* Applin, (*ante* p. *424,) argued so clearly upon "issue" being a word of limitation, he here assumed it to mean *children*.

7. Ogden's Appeal, 70 Penna. St. 501.

With the two preceding cases may, it is conceived, be classed the case of Ward *v.* Bevil, (*a*) where a testator devised a messuage, &c., called B., to his son W. during his life, adding "in case he has issues then it is my will that they should jointly inherit the same after his decease." After other bequests the testator devised over the whole of his property upon W.'s dying without issue. It was held by Alexander, C. B., that W. took an estate tail in B.

Issues jointly to inherit.

It must be admitted that in Doe *v.* Applin and Doe *v.* Cooper Lord Kenyon and most of the other judges distinctly grounded their judgment on the intention appearing by the words devising the property over, that the estate should not pass to the ulterior devisee until a failure of the descendants of the first taker. (*b*) *[And numerous cases will be found in the sequel where similar words have been relied on as favoring a similar conclusion. As part of the context they must necessarily be taken into account upon the question whether the generality of the word issue in the primary devise is restrained by the context. (*c*) But the aid of

Influence of words introducing devise over.

(*a*) 1 Y. & J. 512.

[(*b*) Mr. Jarman's original text continued thus:] "But, it may be asked, is not this intention equally manifest in the gift to the issue in the devise itself? If the word 'issue' in the clause introducing the devise over cannot be satisfied without letting in *all* the descendants, how, *pari ratione*, can it be satisfied in the prior devise by a narrower construction? Supposing that the testator, by evincing an intention that the issue shall take in a manner inconsistent with the devolution of the property under an estate tail, restrained the generality of that term, it seems to be a necessary corollary of this proposition, that the subsequent words, devising the property over in case of the failure of issue of the first taker, are referable to the same objects; for if these words, following a devise to children in fee, be, as we shall presently see they clearly are, merely referential (Goodright *v.* Dunham, Doug. 264; Ginger d. White *v.* White, Willes 348, *post*,) then *a fortiori* they must receive the same construction when the testator has immediately before, and in devising this very property, used the *same word* 'issue.' In truth, the reliance which has been placed upon the words introducing the devise over is quite as indefensible in these cases as where the preceding devise is to 'heirs of the body' (*ante* p. *376); and it appears to have been productive of the same kind of mischief; for here, as there, the consequence is that in several subsequent cases the word 'issue' has been cut down to a word of designation upon grounds such as those, or even feebler than those, adopted by Lord Kenyon in the cases under consideration, *notwithstanding there were words introducing the devise over, which always served to conduct his lordship to the sound conclusion that the testator meant an estate tail.*" [The foregoing argument proceeds on the assumption that Lord Kenyon in the cases referred to first held "issue" to be cut down, by words of distribution, &c., to "children;" but secondly disregarded that upon the strength of the gift over.]

(*c*) See per Parke, B., 15 M. & W. 275.

such words does not appear to be indispensable in order that "issue" in the primary devise may be a word of limitation: in Jackson *v.* Calvert, (*d*) where the devise was of freeholds and leaseholds together to A for life, and after his death to the male issue of his body in equal shares (without more); it was assumed that A was tenant in tail of the freeholds, the only question raised being whether "issue" ought to be similarly construed with regard to the leaseholds, so as to give A the absolute property in them, which was negatived.] (*e*)

Devise over if no issue live to attain twenty-one.

Passing by the cases of Doe d. Davy *v.* Burnsall and Doe *v.* Elvey (*f*) already discussed, we come to Merest *v.* James, (*g*) where the devise was to the use of the testator's daughter for her natural life, and after her decease then to the use of the issue of her body lawfully begotten; and in default of issue, or in case none of such issue lived to attain the age of twenty-one years then over. On a case from chancery the Court of C. P. certified that the daughter took an estate for life only. The reasons on which this opinion was founded do not appear: but Crump *v.* Norwood (*h*) and also Doe *v.* Burnsall were much relied upon as authorities for the construction adopted by the court.

Merest *v.* James examined.

*The solitary ground in this case for diverting the word "issue" from its more extensive signification seems to have been the devise over in case of the issue dying under twenty-one, which it will be remembered is precisely the circumstance that both Lord Eldon and Lord Redesdale considered to have been improperly allowed to control the construction of "heirs of the body" in Doe *v.* Goff; (*i*) and Lord Redesdale strongly denied that such a limitation was inconsistent with giving an estate tail to the prior devisee. (*k*) The case was decided between the period of the determination of Doe *v.* Goff in K. B., and that of its being overruled in D. P.; and this, even if subsequent authority were wanting, would be sufficient to cast a shade of doubt upon the decision: [and although the expression used was "issue" and not "heirs of the body," and Lees *v.* Mosley (*l*) and other cases presently stated have established a distinction between the two expressions in regard to the effect upon them of superadded words as well of distribution as of limitation, yet

(*d*) 1 J. & H. 235.
(*e*) See as to this *post*, ch. XLIV.
(*f*) *Ante* pp. *414, *415.
(*g*) 4 J. B. Moo. 327, 1 Br. & B. 484.
(*h*) *Ante* p. *377.
(*i*) *Ante* p. *376.
(*k*) See Grimshawe *v.* Pickup, 9 Sim. 591.
(*l*) 1 Y. & C. 589.

as there were no superadded words of distribution in Merest *v.* James, that case is not covered by Lees *v.* Mosley and others which have followed it.

To A for life, with remainder to his issue as he should by will appoint, with devise over in default of issue, held estate tail in A.

In Croly *v.* Croly, (*m*) the testator devised all his *estate and interest* in certain lands to his younger son Richard for his life, and after his decease to the use and behoof of *his issue, male or female, in such proportion or proportions as Richard should think proper by his will to devise the same*, and he empowered Richard to charge a jointure for any wife; and in case Richard should die leaving no issue, male or female, then the testator devised his aforesaid *lands* to his eldest son John for his life, and "after his decease to his issue in like manner, and with like power to devise the same to his issue at the time of his decease as in the case of Richard: but in case Richard and John should both die leaving no issue," then over. Richard died without issue, and John died leaving an eldest son and several younger children. The Court of B. R. Ir. certified, on a case from chancery, that the eldest son of John "took" an estate tail under the will and that the younger children took nothing. The certificate reads as if the court thought that the eldest son of John took an estate tail by purchase, but it is conceived they merely meant that he was then tenant in tail (which was all *that it was necessary to decide), and must have considered that he was tenant in tail by descent and not by purchase. If "issue" had been held a word of purchase, *all* the issue, and not the eldest son alone, would have taken.

To A. for life, with remainder to her issue equally, and if A die without issue, over, held estate tail in A.

Again, in Heather *v.* Winder, (*n*) in which there was a devise of lands to A for life to the exclusion of her husband, and at her decease *to her lawful issue, share and share alike*, but if A should die without lawful issue, then over. Sir C. Pepys, M. R., decided that A took an estate tail. He said, "It was clearly established that the words of the gift over, as applied to freehold property, were to be construed as referring to a general indefinite failure of issue of A, and therefore created an estate tail in her. That it was true the issue were

[(*m*) Batty 1. It will be observed that the words would have been sufficient to carry the fee to the issue of Richard, but not necessarily to the issue of John.

(*n*) 5 L. J., (N. S.,) Ch. 41. It is remarkable that this case does not appear to have been cited in any of the subsequent cases on the same point noticed in the text. Several other decisions of the same judge, not reported elsewhere, will be found in the same volume.

to take share and share alike; but Doe *v.* Cooper and Doe *v.* Applin proved that this did not prevent the application of the rule, a doctrine fully confirmed by Jesson *v.* Wright." It is evident from his judgment that the M. R., like Lord Loughborough, considered that Jesson *v.* Wright applied as well where the word "issue" as where the words "heirs of the body" were used; such too was Lord Wensleydale's opinion: (*o*) but Heather *v.* Winder was closely followed by the first of a series of cases before referred to, showing that the word "issue" may be diverted from its primary sense by a context which would not have such an effect on the words "heirs of the body."

But before stating these cases reference should be made to the earlier case of Hockley *v.* Mawbey, (*p*) where a testator devised houses, &c., to his wife for life, and after her decease to his son R. R. and his issue lawfully begotten or to be begotten, to be divided among them as he should think fit, and in case he should die without issue, over. Lord Thurlow held that R. R. took an estate for life only. Assuming that the words were sufficient to carry the fee to the issue as purchasers, this decision agrees with later cases.]

To A and his issue lawfully begotten, to be divided among them as he shall think fit, and in default of issue, over, held issue take by purchase.

*The leading case of the series above referred to is Lees *v.* Mosley, (*q*) where a testator devised certain lands unto his two sons, Henry James and Oswald, in moieties as tenants in common, in such manner and subject to such charges as thereinafter mentioned, that is to say, as to one moiety thereof, to his son Henry James for life, *with remainder to his lawful issue and their respective heirs, in such shares and proportions and subject to such charges as he* (*H. J.*) *should by deed or will appoint; but in case his son Henry James should not marry and have issue who should attain the age of twenty-one years,* then he devised the said moiety to his son Oswald and his heirs forever. And as to the other moiety of the property, the testator devised the same to his son Oswald and his heirs absolutely for-

To H. for life, with power of distribution, in fee in favor of issue, and limitation over, in case of being no issue who should attain twenty-one, held estate for life in H.

(*o*) Roddy *v.* Fitzgerald, 6 H. L. Cas. 881, 882.

(*p*) 1 Ves. 143, 3 B. C. C. 82: in the latter book the will is stated at length. The gift to the issue was not expressly by way of remainder, but could not, it is conceived, be read otherwise. The case is generally treated as one in which the issue taking by purchase might have taken the fee by implication in default of appointment, see Kavanagh *v.* Morland, Kay 25; Prior on Issue, p. 117: but except as to the property described as the testator's "reversion" this point does not seem free from doubt. See Sugd. Pow. 400, 594 (8th ed.); and *ante* ch. XVII., § 6.]

(*q*) 1 Y. & C. 589.

ever. At the date of the will, and at the death of the testator, Henry James was a bachelor. He suffered a recovery of his moiety, and the question (raised in an action between vendor and purchaser) was as to the validity of the title derived under such recovery. The case was elaborately argued, the plaintiff contending that, according to the true construction of the will, there was a gift to the parent for life, with remainder to the children in fee; and the defendants insisting that Henry James took an estate tail. The court decided that he was tenant for life only. Alderson, B. (who delivered the judgment of the court) drew a distinction between a devise to *heirs of the body*, which he considered were technical words admitting but of one meaning, and a devise to *issue*, which he characterized as a word in ordinary use not of a technical nature, and capable of more meanings than one; observing that it was used in the statute *de donis* both as synonymous with children and as descriptive of descendants of every degree, and though the latter might be its *prima facie* meaning, yet the authorities showed that it would yield to the intention of the testator to be collected from the will, *and that it requires a less demonstrative context to show such intention than the technical expression "heirs of the body" would do.* He then proceeded as follows:—"The court in the present case have to look to the term in this will in order to ascertain whether, by construing the word 'issue' here as a word of purchase or of limitation, they best effectuate the intention of the devisor. The testator begins by devising an express estate for life to his son Henry James. He then devises in remainder to his lawful issue. If *it stopped there, it would be an estate tail. For the word 'issue' might include all descendants; and here all being unborn, no assignable reason could exist for distinguishing between any of them. And then the rule in Shelley's Case would apply, and would convert the estate for life previously given into an estate tail. But the testator then adds, 'and their respective heirs in such shares and proportions and subject to such charges as he the said Henry James should by will or deed appoint.' Now, according to Hockley *v.* Mawbey, (*r*) the effect of this clause would be to give the objects of the power an interest in an equal distributive share, in case the power were not executed. The clause, therefore, is equivalent to a declaration by the testator, that the issue and their respective heirs should take equal shares, but that Henry James should have a

Judgment of Alderson, B., in Lees *v.* Mosley.

(*r*) *Ante* p. *428.

power of distributing amongst them the estate in unequal shares if he thought fit. Now, if issue be taken as a word of limitation, the word 'heirs' would be first restrained to 'heirs of the body,' and then altogether rejected as unnecessary. The word 'respective' could have no particular meaning annexed to it; and the apparent intention of the testator to give to Henry James for life, and afterwards to distribute his property in shares amongst the issue, would be frustrated. On the other hand, if issue be taken as a word of purchase, designating either the immediate issue or those living at the death of Henry James, the apparent intention will be effectuated, and all these words will have their peculiar and ordinary acceptation. If, then, the will stopped here, it would seem clear that the court ought to read 'issue' as a word of purchase. Then comes the devise over. 'But in case my son Henry James shall not marry and have issue who shall attain the age of twenty-one, then I give and devise to my son Oswald in fee.' Now, the effect of such a clause, if superadded to a remainder to children, would be to show an intention to give a fee to the children on their attaining twenty-one. And if by the former part of the will the same estate has been given, it does not appear to be sound reasoning to draw the conclusion that such a clause can convert the estate previously given into an estate tail. In fact, the case of Doe *v.* Burnsall (*s*) is a distinct authority on this part of the case. Upon the whole, therefore, we have no doubt in this case that the testator's intention was not to give his son an estate tail, and we think that we best *effectuate that intention by construing the words 'lawful issue' in this will, accompanied by their context, as words of purchase; and, in so doing, we do not impugn the authority of any decided case to be found in the books; for there is not one in which these words, with such a context as in this will, have ever been held to be words of limitation."

Remark on Lees *v.* Mosley.

Lees *v.* Mosley may be considered as deciding that under a devise to A for life, with remainder to his issue and their respective heirs, in such shares as he shall appoint, with a limitation over in case of his dying without issue who should attain majority, the issue take estates in fee as tenants in common, and A is not tenant in tail. It may be also collected from the judgment, that the court (or at least the judge who delivered it) would have arrived at the same conclusion if the devise to the issue had been simply to

(*s*) 6 T. R. 30, *ante* p. *414.

them as tenants in common in fee, without any devise over; in other words, that if a testator devises lands to A for life, with remainder to his issue and their heirs in equal shares, or as tenants in common, the effect is to give to A an estate for life, with remainder to the issue in fee. If, however, the devise was so framed as that the issue, if they took as purchasers, would have an estate for life only (a circumstance which is less likely to occur under a will made or republished since 1837 than any other), it is conceded that the leaning to the construction which makes "issue" a word of purchase would be less strong, and the fate of the devise [was, thus far, left] uncertain.

Tate *v.* Clarke (*t*) shows the opinion of Lord Langdale on this much-controverted point; though, as he decided that, in the events which had happened, the devise to the issue did not extend to the issue claiming (because their parent was not one of the designated sisters of the testator), the case cannot be considered as an actual adjudication on the subject.

To be divided amongst several and to their issue after their respective deaths equally to be divided, "issue" held a word of limitation.

The devise was to the testator's widow for life, with remainder to trustees and their executors, to pay costs, &c., and to divide the residue of the rents amongst all the testator's brothers and sisters "who should be living at the time of the decease of his (the testator's) wife *and to their issue, male and female,* after the respective deceases of his said brothers and sisters, *forever; to be equally divided between and among them.*" Lord Langdale, M. R., held that the words "issue male and female" were to be construed as words of limitation, and not of purchase; and that the *children of a sister of the testator, who died in the lifetime of the widow, took no interest. "The word 'issue,'" he said, "is a word of limitation, if the context of the will does not afford sufficient reasons to construe it otherwise. In the present will I think that it cannot be construed in a sense different from 'heirs of the body;' and if the words 'heirs of the body' had been employed, I think that neither the superadded words *prima facie* denoting distribution, nor the want of a gift over in default of issue, would have afforded sufficient reasons for construing the words otherwise than as words of limitation. This case is not so strong as some others which have been decided; for the words of distribution may be applied to the brothers and sisters who were intended to be first takers, and the words 'their issue' must mean the issue of those

(*t*) 1 Beav. 100.

who were to take, and they are expressly those who should be living at the death of the wife; at which time there was no brother or sister living."

It will be perceived that in this case the devise was to the issue *male and female*, which perhaps (where unaccompanied by expressions showing that the objects were to take concurrently) does not present so decided an inconsistency with an estate tail, as words of distribution, since the course of descent under an estate tail general does, in point of fact, embrace persons of each sex, although not in general simultaneously. (*u*)

[Next in time is Crozier *v.* Crozier, (*x*) where the testator devised leaseholds for lives to her nephew J. C. for life, and from and after his decease to the issue, male and female, of J. C. begotten or to be begotten on his then wife, *to be divided between and amongst them* in such manner, shares and proportions as the said J. C. should by will appoint, subject to the payment by J. C., his heirs, executors, administrators and assigns, and the persons who should become entitled under the will, of the landlord's rent and an annuity of £40 during the continuance of the lease. Sir E. Sugden laid some stress on the absence of a devise over in default of issue, and held that J. C. took an estate for life only, and that the power to appoint raised an implied estate to the issue in default of appointment, which, by force of the direction to pay the annuity, must be an absolute estate for the residue of the lease. If there had been nothing in the will to carry the whole interest in the lease to the issue, he thought *that J. C. would have taken an estate tail in order to carry the whole interest by descent to the issue.

To A for life, with remainder to his issue in such manner as he shall by will appoint. Held issue take by purchase.

So, in Greenwood *v.* Rothwell, (*y*) the devise was to Jonas Greenwood for life, and after his decease unto *all and every the issue* of the body of the said Jonas, *share and share alike, as tenants in common*, and the heirs of such issue. On a case sent for the opinion of the Court of C. B., the judges certified that Jonas Greenwood took only an estate for life; and Lord Langdale, relying on the direction that the issue should take share and share alike, and on the words of limitation

To A for life, with remainder to his issue, as tenants in common in fee. Held issue take by purchase.

[(*u*) See, however, as to this case, per Sir E. Sugden, 3 Jo. & Lat. 57, and per Wood, V. C., Woodhouse *v.* Herrick, *post* p. *436.

(*x*) 3 D. & War. 373, 2 Con. & L. 309.

(*y*) 5 M. & Gr. 628, 6 Scott N. R. 670.

superadded, and adverting also to the absence of a gift in default of issue, affirmed their decision. (z)

To A for life, with remainder to his issue by any future wife in fee; and if he should die without such issue, over. Held issue take by purchase.

Again, in Montgomery *v.* Montgomery (a) the testator devised his *part* (b) of certain lands to his son during his life and no longer, unless it should so happen that his said son should survive his then wife and marry a second or other wife by whom he should have lawful issue living at the time of his death, and then and in that case he devised his *part* of the said lands, upon the death of his son leaving issue male of such second or other marriage, *to such issue male, share and share alike,* and for want of issue male to the issue female of such second or other marriage, share and share alike; and in case his son should die without leaving any such issue of a second or other marriage, then over to two other persons in fee. Sir E. Sugden held that the son took only an estate for life, with concurrent contingent remainders in fee to the issue and the two devisees last named, of which remainders only one was to start according to the event. (c)

(z) 6 Beav. 492.

(a) 3 Jo. & Lat. 47.

(b) The force of this word was sufficient to pass the fee, *ante* p. *285.

(c) The cases of Montgomery *v.* Montgomery, and Greenwood *v.* Rothwell, and Slater *v.* Dangerfield, noticed in the text *post*, must be considered to have overruled Mogg *v.* Mogg, 1 Mer. 654, if at least that case proceeded on the ground that "issue" was to be read as a word of limitation notwithstanding the addition of words of distribution as well as of words of limitation.] The testator devised the residue of his messuages, &c., equally among the child or children begotten and to be begotten of S. *during his, her and their life and lives,* and after the decease of such child and children he gave the same *unto the lawful issue* of such child and children of S., to hold unto such issue *his, her and their heirs* as tenants in common without survivorship, and in default of issue, over; the Court of K. B. on a case from chancery certified that the children of S. took *estates tail.* But it is impossible to ascertain the precise ground on which the case was decided. The limitation to the issue, as purchasers, of children born and to be born would have transgressed the rule against perpetuities; and possibly this circumstance may have induced the court to apply the doctrine of *cy pres,* but to which there seems to be this objection, that it would extend the doctrine (which all agree has already been carried quite far enough) to cases in which an estate in fee simple is given to the issue, in opposition to the rule considered to have been established by the authorities (vol. I., p. *301); besides which if the court saw a very decided reason for holding "issue" to be a word of purchase, why was not the devise restricted to the children (and the issue of children) who were born in the lifetime of the testator, as was done (though perhaps unwarrantably) in certain other devises in the same will, under which the ancestor took an equitable interest only and the issue a legal remainder, (*ante* p. *103,) which two limitations being of different quality could not unite by force of the rule in Shelley's Case?

*On the other hand, in Harrison *v.* Harrison (*d*) the testator devised all the residue of his real *estates* unto and to the use of all his children as tenants in common, during their respective natural lives, and afterwards to their issue as tenants in common. There was no gift over in default of issue. On a case from chancery, the Court of C. B. certified that the children of the testator took an estate tail as tenants in common in the residuary real estate, and that the children of the children took no estate. It may be conjectured that the court avoided the effect of the words "as tenants in common" added to the gift to the issue, by construing them as a direction that the inheritance as well as the life interest of the children should be held in common, in which view the words were not inconsistent with an estate tail in the children, but merely surplusage, and the will was read as if they had been omitted. It must be remarked, however, that one considerable inducement towards holding the ancestor to take an estate tail, namely, a gift over in default of issue, was wanting in this case. The decision, if not referable to the ground above noticed, is clearly opposed to the case of Montgomery *v.* Montgomery before stated (which, being almost contemporaneous, was not cited), and to the case next stated.

To children as tenants in common for life, and afterwards to their issue as tenants in common in fee. Held estate tail in the children.

Remarks on Harrison *v.* Harrison.

Next in order of time is Slater *v.* Dangerfield, (*e*) where the devise was to G. D. for life, and from and immediately after his decease unto and to the use *of all and every the lawful issue* of the said G. D., *their heirs and assigns* forever, as tenants in common and not as joint tenants, when and as he, she or they should attain his, her or their age or ages of twenty-one years. There was no devise over in default of issue, but the will contained a general residuary devise which would have comprised the interest (if any) undisposed of under the first gift. The Court of Exchequer held that G. D. took an estate for life only, and relied upon Greenwood *v.* Rothwell, as being exactly in point, and on Lees *v.* Mosley as going even further, inasmuch as in that case there was what was not found in the case before the court, namely, a devise over: for the residuary devise was not equivalent.

To A for life, with remainder to his issue as tenants in common in fee. Held issue take by purchase.

*Next follows Doe d. Cannon *v.* Rucastle, (*f*) where the testator

[(*d*) 7 M. & Gr. 938, 8 Scott N. R. 862.
(*e*) 15 M. & Wels. 263. See also Golder *v.* Cropp, 5 Jur. (N. S.) 562.
(*f*) 8 C. B. 876; and see Rimington *v.* Cannon, 12 C. B. 18, on same will.

To A for life, with remainder to his issue equally, and if he should not leave issue at his death, over. Held estate tail in A.

devised a dwelling-house and field to A for life, and after his decease he devised the same *to the issue of his body* lawfully begotten, *if more than one equally amongst them*, and in case he should not leave any issue of his body lawfully begotten *at the time of his death*, (*g*) then to the testator's heir or heirs-at-law; the Court of C. B. decided that A took an estate tail.

To A for life, and if she die leaving issue, equally between them; but if A leave no issue, over. Held estate tail in A.

So, in Kavanagh *v.* Morland, (*h*) where lands were devised to A for life, and after her decease, in case A should die leaving issue, the testator gave to her said issue all his freehold and copyhold lands to be distributed between them, share and share alike, as three gentlemen learned in the law should affix the same, but in case A should die leaving no issue, then over; Sir W. P. Wood, V. C., decided that A took an estate tail, considering that if the issue took by purchase there was not sufficient in the will to carry the fee to them, and the gift over not being to take place except upon an indefinite failure of issue of A.: A must consequently take an estate tail. As to the gift over he observed, that "if there be a gift to the issue, and a limitation in the will with reference to them, which has the effect of giving to them the fee simple; then, if there be a gift over in case of dying without issue, the gift over affords no evidence of intention to justify the application of the rule in Shelley's Case, because the fee was in the issue, and the words 'dying without issue' are consequently held to mean only such issue as were before mentioned, as in the cases of Hockley *v.* Mawbey (*i*) and Leeming *v.* Sherratt. (*k*) But it must first be made out that the fee is in the issue as purchasers. If that be not so, and words occur importing a gift over in fee after an indefinite failure of issue, then the words giving over the property in the event of an indefinite failure of issue have been held to be so strongly indicative of the intention of the testator that the estate should not pass over except upon failure of all the issue, that those words are made to reflect back upon the preceding limitations to the issue, and have this effect, namely, that if the limitations to the issue do not of themselves clearly effect the intention of the testator of not giving over the prop-

Remarks of Sir W. P. Wood on effect of gift over on general failure of issue.

(*g*) The court gave no effect to the argument that these words would have enlarged the estate of the issue taking by purchase to a fee simple; see *ante* pp. *272, *427.

(*h*) Kay 16.

(*i*) 1 Ves., Jr., 142, *ante* p. *428.

(*k*) 2 Hare 14 (personalty.)

erty until the issue fail—that is, if for want of superadded words of limitation they would take *life estates as purchasers only, and therefore the gift to them cannot effect the general intention, the court is obliged to construe the word 'issue' in the original gift as a word of limitation, for the purpose of carrying into effect the general intention implied from the gift over."

To children for their lives, with remainder to trustees to preserve, with remainder between the issue of the children, and for want of such issue, over. Held an estate tail in children.

Again, in Woodhouse *v.* Herrick, (*l*) where the testator devised houses and lands (after a previous life estate to his wife) to F. and M. his wife for their joint lives and the life of the survivor of them, with remainder to trustees to preserve contingent remainders; and from and after the several deceases of F. and M. his wife the testator devised his said messuages and lands unto all the children of the said F. and M. his wife, whether male or female, for their joint lives and the life of the survivor; and from and after their several deceases he gave and devised the same premises to the said trustees for the life of all the said children of the said F. and M. his wife, whether male or female, in trust to preserve contingent remainders, and to permit the said children to receive the rents and profits during their natural lives; and from and after their several deceases the said testator gave and devised the said premises unto and equally between all their issue male and female, and for want of such issue, over. Sir W. P. Wood, V. C., held that the children of F. and M. took as tenants in common in tail with cross remainders in tail. If he could have read the words as creating a tenancy in common among the children only (*i. e.*, among the *stirpes*), and not among the issue *inter se*, he thought all difficulty would have been avoided; because then it would have been a simple gift to each child for life, with remainder to his issue, and for want of such issue, over; which would clearly be an estate tail in the first takers. But he could not so read the will: it was clearly a tenancy in common among the issue. He then noticed some of the principal authorities, and grounded his decision principally on the consideration that from the whole will the intent appeared to be that the issue in every degree of the children should take, but if the issue took by purchase they could only take for life, and the intent would be frustrated; the only way of giving effect to that intent was to hold the children to take as tenants in common in tail. As to the argument, that "such issue" in

(*l*) 1 K. & J. 352.

the gift over referred to those who had been ascertained from the anterior part of the will were to be first *takers, he said it involved a fallacy; the true mode of construing a will was not to stop short of any one point and say you there ascertain who are meant by the word "issue" or any other word, but to read the whole will and make up your mind as to the true construction and effect of the whole instrument; it was a fallacy to say a definite meaning should be fixed to the word "issue" in one part of the will, and then to say that "such issue" in a subsequent part is necessarily and of course immaterial with reference to the construction of the word "issue" where it first occurs in the will.

To children and the survivors and survivor for life, and then to their lawful issue, and the heirs of the body of such issue, with cross remainders between the issue. Held that the children took for life.

But in Parker *v.* Clarke, (*m*) where lands were directed to be conveyed upon trust for the children of the testator's niece during their lives, and for the survivors or survivor of them during their, his or her lives or life, and after the decease of the last survivor of the said children, then in trust for all and every the lawful issue male and female of such of the children of his niece then or thereafter to be born as should be living at the testator's decease, in equal shares and proportions as tenants in common and not as joint tenants, and the heirs of the body and respective bodies of all and every the issue of the said children; and on the death and failure of heirs of the body of any one or more of the issue of the said children, as well the original share or shares of him, her or them so dying, and of whom there should be such a failure of heirs of the body as aforesaid, as also such share or shares as should accrue to him, her or them, or his, her or their issue, should be in trust for the survivors and survivor and others or other of them, if more than one, in equal shares as tenants in common and not as joint tenants, and for the heirs of the body or respective bodies of such surviving issue, and for default of issue to inherit under the preceding limitations, then upon certain other trusts. It was held by Lord Cranworth, C., affirming the decision of Sir J. Stuart, V. C., that the children of the nieces took estates for life only.

To A for life, and after his death to his issue, as he should ap-

The last of this series of cases is Roddy *v.* Fitzgerald, (*n*) where the testator devised renewable freeholds for lives "to his son during his life, and after his death to his lawful issue in such manner, shares and proportions as he by deed or will

(*m*) 3 Sm. & G. 161, 6 D., M. & G. 104. (*n*) 6 H. L. Cas. 823.

should appoint, and for want of such appointment, then to his issue equally if more than one, and if only one child to such only child; and in case of his said son dying without issue," then *over. The case was argued in D. P. in the presence of seven of the judges, four of whom held that the son was tenant in tail, and with them agreed Lords Cranworth and Wensleydale, and judgment was given accordingly. The other three judges thought the son took for life only, with remainder by purchase to the issue; but their judgment was based chiefly on the opinion that the issue took an estate in fee simple by implication from the power, which it was admitted authorized an appointment to them in fee. This opinion, however, was conclusively shown to be wrong; there being in default of appointment an express gift to the issue, which carried only life estates, and which, according to the well-known rule "*expressum facit cessare tacitum*," excluded all further extension of the devise by implication. (*o*)

point, and, in default, to his issue equally; if one child, to such child, and, in default of issue, over.

Though these decisions are not altogether in unison, yet, having regard to the fact that the later cases clearly overrule some of those of earlier date, we may, perhaps, venture to lay down the following propositions as now recognized:

Propositions to be deduced from the cases.

1st. Where words of distribution, but without words to carry an estate in fee, are annexed to the devise to the issue, and there is a gift over in default of issue of the ancestor generally, (*p*) or in default of "such" issue, (*q*) or in default of issue living at the death of the ancestor, (*r*) the ancestor takes an estate tail. As to the validity of this position, the cases seem to admit of no reasonable doubt, and it appears to be immaterial that between the gift to the ancestor and that to the issue, there is a limitation to trustees to preserve contingent remainders. (*s*)

2ndly. Where the gift is as in the first proposition, but there is *no* gift over in default of issue, still, since the issue taking by purchase could only take for their lives, the ancestor is held to take an estate

(*o*) *Ante*, vol. I., p. *551. Upon the question whether an estate for life by purchase might be given to the issue, with *remainder* in tail to the son, Crompton, J., held that the authorities did not warrant such a construction. See Parr *v.* Swindels, and other cases stated, ch. XL., § 3, subs. 2.

(*p*) Doe *v.* Applin, 4 T. R. 82; Doe *v.* Cooper, 1 East 229; Ward *v.* Bevil, 1 Y. & J. 512; Croly *v.* Croly, Batty 1; Heather *v.* Winder, 5 L. J., (N. S.,) Ch. 41; Kavanagh *v.* Morland, Kay 16; Roddy *v.* Fitzgerald, 6 H. L. Cas. 823.

(*q*) Woodhouse *v.* Herrick, 1 K. & J. 352.

(*r*) Doe *v.* Rucastle, 8 C. B. 876.

(*s*) Woodhouse *v.* Herrick, *sup.*

tail, which, if not barred, will descend to his issue, this being the only mode of carrying the inheritance to the issue. (*t*)

3rdly. Where words of distribution together with words which would carry an estate in fee are annexed to the gift to the issue, *the ancestor takes an estate for life only, and the result is the same whether the fee is given by the technical words "heirs and assigns," (*u*) or by such words as "estate," "part," "share," &c., occurring in the description of the subject of gift, or words imposing a pecuniary charge upon the issue, and whether the gift to the issue be direct or by implication from a power to appoint to them, (*x*) and whether there is a gift over on general failure of the issue of the ancestor (*y*) or not; (*z*) and the same rule applies where the issue would take an estate tail. (*a*)

The result of the cases as applied to wills made since 1837.

The first and second of the above propositions are materially affected by the statute 1 Vict., c. 26. For, since the third proposition applies not only to those cases where the issue would take the fee under an express limitation to their "heirs and assigns," but also apparently includes all other cases where the words are sufficient to give them the fee, and since under the recent statute a devise to issue indefinitely will give the fee to the issue and not an estate for life merely as under the old law, it follows that we must, in a will made since 1837, construe such devises as those falling within the first and second of the above propositions in the same manner as if words of limitation were superadded, and such devises will then coincide with those falling within the third proposition. The law on this point as to wills made since 1837 will thus be reduced to a very simple general rule—namely, that *every* devise to a person for life and after his decease to his issue, in words which direct or imply distribution between the issue, gives the issue an estate fee in remainder by purchase.]

General rule as to such wills.

(*t*) Per Sugden, C., Crozier *v.* Crozier, 3 D. & War. 373; per Wood, V. C., Kavanagh *v.* Morland, Kay 16; Jackson *v.* Calvert, 1 J. & H. 235.

(*u*) Lees *v.* Mosley, 1 Y. & C. 589, *ante* p. *429; Greenwood *v.* Rothwell, 5 M. & Gr. 628, 6 Scott N. R. 670, 6 Beav. 492, *ante* p. *433; Slater *v.* Dangerfield, 15 M. & Wels. 263, *ante* p. *434; Golder *v.* Cropp, 5 Jur. (N. S.) 562.

(*x*) Crozier *v.* Crozier, 3 D. & War. 373, *ante* p. *432; Montgomery *v.* Montgomery, 3 Jo. & Lat. 47, *ante* p. *433; Bradley *v.* Cartwright, L. R., 2 C. P. 511, where the statement in the text was approved.

(*y*) Montgomery *v.* Montgomery, 3 Jo. & Lat. 47, *ante* p. *433.

(*z*) Lees *v.* Mosley, Greenwood *v.* Rothwell, Slater *v.* Dangerfield, all cited *ante* n. (*u*).

(*a*) Parker *v.* Clarke, 6 D., M. & G. 104, *ante* p. *437.]

It is observable that, in Lees *v.* Mosley (and the same remark applies to many other cases), it does not distinctly appear whether, in pronouncing "issue" to be a word of purchase, the court intended to construe it as synonymous with *children*, or as admitting descendants of every degree. (*b*) The latter, it is *presumed, would be its construction in the absence of a restraining context. (*c*) What amounts to such a context will be the subject of consideration in the next division of this section, which this remark will serve to introduce.

Whether "issue," where a word of purchase, is confined to *children*.

II.—4. If the testator annex to the gift to the issue words of explanation, indicating that he uses the term "issue" in a special and limited sense, it is of course restricted to that sense.

"Issue" explained to mean *sons*.

As in Mandeville *v.* Lackey, (*d*) where a testator devised his real estate in certain counties to M. during his life only, subject to a certain condition, and after the determination of that estate to M.'s *lawful*

Issue not restricted to children.—(*b*) Dalzell *v.* Welch, 2 Sim. 319, seems to bear upon this point, and favors the more enlarged construction of the term "issue."

A moiety of certain real estate was devised to D. for life, remainder to and among his issue as he should by will appoint, remainder to his issue living at his death, in fee. D. made an appointment in favor of his children only, though he left also grandchildren and great grandchildren. Sir L. Shadwell, V. C., held the appointment to be invalid, on the ground of its excluding the donee's grandchildren and great grandchildren, who were objects of the power as being included under the denomination of issue. The chief argument for the contrary construction was founded on a previous part of the will, in which the testator had bequeathed personalty to A for life, and, in case she should leave *issue* living, then to be paid and applied among *such child or children* in such proportions, &c., as A should appoint; and, in default of appointment, among *such issue* in equal shares, and, if but one *child*, the whole to be paid to such one; and, in case there should be no issue of A living at her decease, or if they should all die before attaining twenty-one, then over. The V. C. thought that the word "children" meant *issue* in this instance, for that the testator could not intend that, if A left a grandchild and no child, the property should go over.* *At all events, as a similar phraseology was not adopted in the latter part of the will, the word "issue" must be considered as used in the sense it generally bears.* [And see Hall *v.* Nalder, 17 Jur. 224.]

(*c*) As to the mode in which the several degrees of issue take in such cases, see *ante* pp. *101, *102.

(*d*) 3 Ridg. P. C. 352, Hayes' Inq. 145, n. See same principle as to *heirs of the body*, Goodtitle d. Sweet *v.* Herring, 1 East 264, and other cases stated *ante* p. *383, *et seq.*

* Compare this with Ryan *v.* Cowley, *sup.*, and Carter *v.* Bentall, *post* p. *441.

issue male, and the lawful issue male of such heirs, the eldest always of *such sons* of M. to be preferred before the youngest, according to their seniority in age and priority in birth, and for want of such lawful issue in M., over: the Court of K. B., Ir., held that M. took only an estate for life, which was affirmed in D. P. Ir. with the unanimous concurrence of the judges, on the ground that the word "issue" was explained to mean "sons." The L. C. said the subsequent words of explanation seemed to him to point out the *sons* of M. by name, as the persons whom the testator meant by issue male.

"Issue" explained to mean *children*.

So, in Ryan *v.* Cowley, (*e*) where a testator devised and bequeathed to trustees freehold and leasehold and other personal property, upon trust for his daughter for life; and after her decease the rents and profits and interest of money he gave, *devised and bequeathed to and amongst the *issue* of his said daughter lawfully to be begotten, in such shares and proportions as she should by her last will and testament appoint, provided such *child or children* should arrive at the age of twenty-one years; and for want of such issue of his daughter, or in case of the death of such issue, and of the death of his wife, the testator devised all his property to other persons. It was contended on behalf of the daughter that the word "issue" was to be construed as a word of limitation, and consequently that she took an estate tail in the freehold, and an absolute interest in the chattel property. But the L. C. (Sugden) held that the daughter took a life interest only. "The term 'issue'" (he observed) "may be employed either as a word of purchase or of limitation; but when the testator adds, 'provided such child or children shall attain twenty-one, and for want of such issue, then' over, he translates his own language, and clearly shows that he uses the word 'issue' as synonymous with child or children."

[So, in Bradley *v.* Cartwright, (*f*) where land was devised to S. B. for life, remainder to trustees to preserve contingent remainders, remainder to the use of *all and every the issue, child or children* of the body of S. B., in such shares, manner and form as S. B. should by deed or will appoint, and in default of such issue over; it was held that "issue" was explained to mean children.

(*e*) 1 Ll. & G. 7. See also Machell *v.* Weeding, 8 Sim. 4, *ante* vol. I., p. *554; Pruen *v.* Osborne, 11 Sim. 132; [Bradshaw *v.* Melling, 19 Beav. 417.

(*f*) L. R., 2 C. P. 511. See also Farrant *v.* Nichols, 9 Beav. 327 (personalty;)] and see a similar construction applied to articles for a settlement, Campbell *v.* Sandys, 1 Sch. & Lef. 281.

But in Roddy *v.* Fitzgerald (*g*) the words "if only one child to such only child" were held insufficient to limit the generality of the term "issue;" for although "issue" included children, it did not follow that it included none besides. The testator "certainly meant (said Lord Cranworth) that if there was only one child that child should take. But that the child would do consistently with the intention that the estate should go to the issue through all time of the first taker."] (*h*)

"Issue" not explained to mean children.

But in the previous case of Carter *v.* Bentall, (*i*) where a testator gave the [dividends of certain stock to his wife for life, and gave the income of the residue of his personal estate and the rents of his real estate to his daughter for her life; and after the death of his wife and daughter he gave the residue] of his *real and personal estate to trustees, upon trust to sell and to transfer one moiety of the produce to the issue of his daughter in equal shares, to be paid to them at their respective ages of twenty-one; and if only one *child* then to such one *child*, for his, her or their benefit. And the testator ordered the trustees to lay out the dividends in the maintenance of such "issue;" and in default of such issue, over: (*k*) Lord Langdale, M. R., held that the word "issue" was here explained to mean *children*.

"Issue" explained to mean *children*.

[After Roddy *v.* Fitzgerald, this cannot be considered an authority upon the construction of such terms in a gift of real estate, unless it can be distinguished by reason of the trust for sale, which certainly seems inconsistent with the existence in the daughter of an estate tail in one moiety. But personalty differs from realty in this, that it is not descendible but distributable: the use of the word "issue" in a gift of personalty as an equivalent for "heirs of the body" is, therefore, a misapplication of it which suggests the probability that it was not intended to be so used; and thus the case is freed from the chief considerations which have prevented the word when used in a gift of realty from receiving a restricted meaning from the context. Carter *v.* Bentall was followed by Sir C.

Distinction between real and personal property.

[(*g*) 6 H. L. Cas. 823, stated above, p. *437.

(*h*) Applying what Lord Eldon said in Jesson *v.* Wright with reference to "heirs of the body," *ante* p. *367.]

(*i*) 2 Beav. 551.

(*k*) The chief discussion was, whether, in respect of the *other* moiety, a gift over on failure of issue of the testator's mother and daughter, (to whose children no gift was made,) the word "issue" was to be read "children," and it was held not.

Hall, V. C., in a case (*l*) where personalty was given to A for life, and after his death to his issue surviving him, equally if more than one, and "if but one (*i. e.*, one issue) then for *such* only *child*," with a gift over "in default of issue becoming entitled to" the legacy. And of course where personalty was bequeathed to several for their lives, and after the death of each leaving issue her share to be paid to such issue, *if more than one child* equally to be divided between them, it was held that "issue" was explained to mean children. (*m*)

Even a devise of real estate worded as in the last case would, according to North *v.* Martin, (*n*) be construed in like manner. *The case at least would be quite different from Roddy *v.* Fitzgerald, since a plurality of children taking as tenants in common would not be consistent with an estate descending from A.]

Effect where "issue" and "children", have elsewhere been used indifferently.

And of course it is a circumstance favorable to the construction in question, that the testator has in other parts of his will used the words "children" and "issue" indifferently. (*o*)

Indeed it has been considered to be a conclusive ground for construing the word "issue" to mean *children*, that the testator has elsewhere employed it in this limited sense. (*p*)

(*l*) [In re Hopkins' Trusts, 9 Ch. D. 131.] See also Swift *v.* Swift, 8 Sim. 168 (articles for a settlement.) **Special construction of issue living at the death, in an executory trust.**—In Stonor *v.* Curwen, 5 Sim. 264, a testator directed personalty to be settled in trust for his niece A for life, but to devolve *to her issue at her death*, and, failing issue, to his nephew B. It was held that the trust embraced the children living at the death of A, and the issue then living of any deceased child or children. It will be observed that this was an executory trust; [and see Lister *v.* Tidd, 29 Beav. 618.

(*m*) Bryden *v.* Willett, L. R., 7 Eq. 472. That in a bequest of personalty to A for life, remainder to his issue, "issue" is not a word of limitation. See ch. XLIV.

(*n*) 6 Sim. 266, stated *ante* p. *383.]

(*o*) Cursham *v.* Newland, 2 Bing. N. C. 58, 2 Scott 105, 2 Beav. 145, 4 M. & Wels. 101.

Uniformity of construction on recurrence of same word.—(*p*) Ridgeway *v.* Munkittrick, 1 Dr. & War. 84. In this case Sir E. Sugden said, "It is a well-settled rule of construction, and one to which from its soundness I shall always strictly adhere, never to put a different construction on the same word, where it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary." To this proposition no objection can be advanced; but it seems not entirely to dispose of the difficulties attending these cases, for the question still is, what amounts to such "a clear intention to the contrary" as will take any given case out of the rule. Different minds may (as the reports abundantly testify) estimate variously the force of context requisite to outweigh the presumption of similarity of intention from the recurrence of the same expression. Where a term is in some instances accompanied by an explanatory context,

But of course the word "issue" will not be cut down to *children* by the mere circumstance of the words "children" and "issue" being previously used synonymously, if in those prior instances there was fair ground to conclude that both terms were used in the sense of issue. (*q*)

A leading and often-cited example of the word "children" being used in the sense of *issue*, is Gale *v.* Bennett, (*r*) where a testator gave real and personal estate to his daughter H. for life, and remainder to her children at twenty-one; and, in default of such issue, then to his other daughters that should be living at the time of the death and failure of issue of H., and the *child or children* of such of his other daughters as should be dead, as tenants in common in fee; but such children to take only their parent's share: but in case there should be none of his other daughters, nor any *issue* of his other daughters then living, the testator bequeathed over the property. H. died childless; and it was held that the grandchild of another daughter who died *in the lifetime of the testator was entitled, the words child and children being here used as synonymous with issue. (*s*)

"Children" held to mean issue.

The present division will be concluded by the statement of two cases of the converse kind, namely, in which the word "issue" has been used in the restricted sense of *children*. In one of these, Ellis *v.* Selby, (*t*) a testator bequeathed his funded property upon trust for A for life, and after his decease, should he have *issue* lawfully begotten, whether male or female, to pay the interest for the maintenance and education of such *issue*, if more than one, share and share alike, and if only one for the mainte-

Bequest to children made to govern prior gift to "issue."

and in other instances not, a judge may see in the occasional omission of the explanatory phrase sufficient ground to infer a difference of intention in the respective instances, of which Dalzell *v.* Welch, 2 Sim. 319, *ante* p. *439, n., affords an example. In such cases, the general plan of the will must be regarded; and if we find that the testator's dispositive scheme would be violated by not giving to any term a uniform construction throughout the will, the argument for its adoption is very strong. Where the dispositions of the will are of a nature not to afford any such light, the task of its expounder becomes very embarrassing.

(*q*) Dalzell *v.* Welch, 2 Sim. 319, *ante* p. *439, n.; and see further on this point, *ante* p. *106.

(*r*) Amb. 681 [and stated from Reg. Lib., 3 De G. & J. 276.] See also Wyth *v.* Blackmon, 1 Ves. 196, *ante* p. *107, Amb. 555, *nom.* Wythe *v.* Thurlston.

(*s*) Much stress in the arguments at the bar was laid on the fact of there being no child; but the inadmissibility of such a principle of construction has been elsewhere shown, *ante* p. *148.

(*t*) 7 Sim. 352.

nance of such one, during his, her or their nonage; and, on their attaining the age of twenty-one years, to transfer the same to them if more than one, and if only one then to such one; and, after the decease of B (to whom the testator had given the dividends on his bank stock for life), he gave the dividends thereof to A for the term of his life, and, after his decease, upon trust for the lawful *children or child* if only one of A *in such manner as he* (the testator) *had thereinbefore willed and directed respecting his funded property;* and, if A should happen to die without *issue male or female* of his body lawfully begotten, then over: Sir L. Shadwell, V. C., was of opinion that the words "die without issue male or female" in the bequest over referred to *children*, the testator having clearly explained himself to mean children in the prior gift to the issue male and female.

"Issue" held to mean *children* by reference to another gift.

The other case referred to is Peel *v.* Catlow, (*u*) where a testator bequeathed one-sixth part of his residuary estate amongst the *children* of his late sister Jane T., to be paid at twenty-one, and, in case any such *child* or *children* should die under age leaving *issue* living at his, her or their decease, their shares to be paid to the issue of such child or children respectively, with a bequest over of the shares of any child or children dying in minority without leaving issue, to the survivors and the issue of any who should have died leaving issue as aforesaid (such issue to take no greater share than their respective parents would have been entitled to, if living.) And, as to one other sixth part, upon trust to pay the interest to the testator's sister, Mary C.: and, after her decease, to pay and apply the said share unto and amongst her *issue*, and to be payable at the like *times, and with the like benefit of survivorship and accruer, *and in like manner as is thereinbefore expressed concerning the sixth part given to the children of his* (the testator's) *late sister Jane T.;* and in case the testator's sister Mary should die without leaving issue at her decease, or leaving any, they should die under twenty-one and should leave no issue living at his or their decease, then over: Sir L. Shadwell, V. C., was of opinion that the bequest to the "issue" of the testator's sister Mary must of necessity be taken to mean *children*, by force of the terms of reference to the prior bequest to the children of Jane.

It may be observed, in support of the construction adopted by the

(*u*) 9 Sim. 372.

court, that the testator had used the word "issue" in the sense of *children* in reference to both the share of the children of Jane and the share of Mary, namely, in the clauses which provided for the event of their respectively dying *under age* without issue living at their decease, where it is obvious the word "*issue*" necessarily meant *children*, as a minor could not leave issue of a remoter degree.

Remark on Peel v. Catlow.

II.—5. It remains to be observed, that where a devise to a person and his issue (or to him and the heirs of his body) (*x*) is followed by a limitation over in case of his dying without leaving issue *living at his death*, the only effect of these special words is to make the remainder contingent on the prescribed event. They are not considered as explanatory of the species of issue included in the prior devise, (*y*) and, therefore, do not prevent the prior devisee taking an estate tail under it. (*z*) The result simply is, that if the tenant in tail has no issue at his death, the devise over takes effect; if otherwise, the devise over is defeated, notwithstanding a *subsequent* failure of issue. (*a*)

Limitation over if the devisee leave no issue at his death.

In Doe d. Gilman *v.* Elvey (*b*) the circumstance of there being *a limitation over on failure of issue at the death of the prior devisee does not appear to have given rise to an argument against an estate tail. The only doubt, it is conceived, could possibly be, whether it would have the effect of rendering the remainder expectant on the estate tail contingent on the event of the devisee in tail leaving no issue

(*x*) Wright *v.* Pearson, 1 Ed. 119, *ante* p. *360, but where it was not necessary to decide its effect upon the remainder. [Cf. Abram *v.* Ward, 6 Hare 165. In Richards *v.* Davies, 13 C. B. (N. S.) 69, 861, where a devise was to A for life, remainder to such of her children as she should by *will* appoint, and in default to her children and the heirs of their bodies in equal shares, "and in case of the death of A without leaving any child living at her death, and in the event of such child or children surviving her and dying without leaving issue," to testator's right heirs; it was held that the express gift in tail to the children was not made contingent on their surviving A by the terms of the power (see vol. I., p. *552) and of the gift over.]

(*y*) See Hutchinson *v.* Stephens, 1 Kee. 240, *post.*

(*z*) [Doe *v.* Rucastle, 8 C. B. 876; Marshall *v.* Grime, 28 Beav. 375.] Indeed, in one instance, we have seen (*ante* p. *412) even an express devise to A and the issue living at his death was held to confer an estate tail; but this is a construction which probably would not be universally acquiesced in.

[(*a*) Eden *v.* Wilson, 4 H. L. Cas. 257, 281, *ante* vol. I., p. *502.]

(*b*) 4 East 313, *ante* p. *415.

at his death. (c) The affirmative, however, seems to be the better opinion, as the courts would hardly feel themselves authorized, without a context, to reject the clause "living at his decease." But words of an equivocal import would certainly not have the effect of subjecting the remainder to such a contingency. (*d.*)

Bequest over on failure of issue at the death, following bequest to A and B and their issue.—(c) See an instance of such construction applied to personalty in Lyon *v.* Mitchell, 1 Mad. 467, where personal estate was bequeathed to A, B, C and D, as tenants in common, and to the issue of their respective bodies; but in case of the death of any or either of them without issue living at the time of his or their respective deaths, then over to the survivors, and to the issue of their respective bodies. It was held that the bequest passed absolute interests to A, B, C and D, subject to an executory bequest in case of their respectively dying without leaving issue at their decease.

(*d*) See Broadhurst *v.* Morris, 2 B. & Ad. 1, *ante* p. *391.

*CHAPTER XL.

WORDS "IN DEFAULT OF ISSUE," ETC., WHEN REFERABLE TO THE OBJECTS OF A PRIOR DEVISE.

I. *Preliminary Remarks.*
II. *Construction in regard to Personalty.*
III. *In relation to Real Estate.* 1. *Where the expression is "Such Issue."* 2. *Where the reference is to "Issue" simply.* 3. *Conclusions from the Cases.* 4. *Doctrine of General and Particular Intention.* 5. *Devises of Reversions.*
IV. *Effect of stat.* 1 *Vict., c.* 26, § 29.

Preliminary remarks.

I.—The expression which forms the subject of consideration in this chapter stands pre-eminent for the number and variety of the questions of construction to which it has given rise. The offices assigned to it are very numerous, and vary of course with the context. Following a devise to heirs *general,* a clause of this nature, we have seen, frequently explains the word "heirs" to mean heirs *special, i. e.,* heirs of the body, and cuts down the estate comprised in the prior devise to an estate tail, (*a*) unless there is ground for restraining the term "issue" to issue living *at the death.*[1] Preceded by a devise indefinitely, or expressly for life, to the person whose issue is referred to, the words in question (occurring in a will which is subject to the old law) have the effect of enlarging such prior devise to an estate tail, (*b*) unless they are restrained as before suggested, or *unless there is an intermediate devise to some class or denomination of issue to which they can be referred.*[2] To determine in what cases the

(*a*) *Ante* vol. I., p. *554.

1. Ide *v.* Ide, 5 Mass. 500; Caskey *v.* Brewer, 17 Serg. & R. 441; Heffner *v.* Knepper, 6 Watts 18; Hollett *v.* Pope, 3 Harring. 542; Bells *v.* Gillespie, 5 Rand. (Va.) 273; Broaddus *v.* Turner, Id. 308; Hill *v.* Burrow, 3 Call 342; Newton *v.* Griffith, 1 Harr. & G. 111; Dallam *v.* Dallam, 7 Harr. & J. 220.

(*b*) *Ante* vol. I., p. *554.

2. "The construction of gifts over in default of issue is not affected by the wills act where those words are construed to mean default of issue to take under the preceding limitations. It becomes necessary, therefore, to consider in what cases the referential construction has been adopted.

"A. Where the words are for default of *such issue,* they naturally refer to the issue before mentioned.

"1. This is clearly the case where

latter construction prevails, is the present object of inquiry. The distinctions which the authorities present require particular attention, and they will be found upon the whole to be more easily reducible to a few general propositions than is commonly supposed. It will be

the prior limitations are in tail. Doe d. Phipps *v.* Lord Mulgrave, 5 T. R. 320.

"2. So where the prior limitations are to children and their heirs, a gift over in default of such issue means in default of such children. Doe d. Comberbach *v.* Perryn, 3 T. R. 484; Rex *v.* Marquess of Stafford, 7 East 521.

"But if there is anything to show that the children were intended to take estates tail, the words in default of such issue may be referred to the word heirs so as to cut down the estates to estates tail. Thus, where the limitation was to the first and other sons and their heirs, a gift over in default of such issue was referred to the word heirs, the intention being that the sons were to take in succession. Lewis d. Ormond *v.* Waters, 6 East 336.

"In Biddulph *v.* Lees, 8 E. & B. 289, the intention to give estates tail was apparent from the shifting clause.

"3. And even though the limitation be to children simply, so that they would only take for life, a gift over in default of such issue will be construed referentially. Hay *v.* Earl of Coventry, 3 T. R. 83; Denn d. Breddon *v.* Page, 3 T. R. 87, n., 11 East 603, n.; Ashley *v.* Ashley, 6 Sim. 358; Bridger *v.* Barnsay, 10 Ha. 320; Re Arnold's Estate, 33 B. 163.

"4. On the other hand, where there is a limitation to a first son without more, followed by limitations in default of such issue to the other sons in tail, the court will lay hold of small circumstances to give the first son also an estate tail.

"Thus, in Evans d. Brooke *v.* Astley, 3 Burr. 1569, there was the circumstance that the testator referred to the earlier limitations as including the 'parent and his descendants.'

"In Clements *v.* Paske, 3 Doug. 384, the limitation to the first son was referred by the word 'likewise' to other limitations in fee.

"And see Doe d. Harris *v.* Taylor, 10 Q. B. 718, which may perhaps be supported on the ground that the words 'the elder of such sons and the heirs of his body to take before the younger,' applied to the first son as well as to the others. See, however, Barnacle *v.* Nightingale, 14 Sim. 456; and see Galley *v.* Barrington, 2 Bing. 387; In re Denney's Estate, L. R., 8 Eq. 427.

"5. The *prima facie* meaning of the word 'such' is to refer the word with which it is coupled to earlier words, so that the latter word is only a compendious statement of the earlier limitations; it may, however, have the converse effect, if there is anything upon the will to show that the testator used the earlier word in the sense of the later; and the word 'such' may be rejected, if the term with which it is coupled and that to which it refers are so inconsistent with each other that the testator cannot have meant the one as a mere compendious reference to the other.

"Thus, a devise to A and his heirs, and in default of such issue over, would, perhaps, in a will cut down A's estate to an estate tail. See Idle *v.* Cook, 1 P. Wms. 70.

"And in Parker *v.* Tootal, 11 H. L. 143, where the devise was to Thomas for life, remainder to the first son of the said Thomas in tail male lawfully begotten, severally and successively; and for want of such lawful issue either of Thomas or of James, over, the word 'such' was practically rejected, and Thomas took an estate tail.

"B. When there is a devise to A for life, followed by particular limitations in

proper to separate gifts of real and personal estate; for as the construing of the words in question to import a general failure of issue in regard to *personalty*, necessarily renders void the gift over which is to take effect on such contingency, (c) the disinclination of the courts to

favor of some of his issue, with an ultimate limitation on failure of the issue of A, the question arises whether the intention was to benefit all the issue, notwithstanding the incomplete enumeration of them under the special limitation, in which case, in wills before the wills act, the gift over in default of issue will give A an estate tail, or whether the issue intended to be benefited are sufficiently indicated by the special limitations, in which case the failure of issue will be construed to mean such issue as before mentioned.

"1. If the devise is to A for life, then to his children, so that they take vested estates in fee or tail, and in default of issue of A over, issue means the issue before mentioned, and A's estate will not be enlarged. Foster v. Hayes, 2 E. & B. 27, 4 E. & B. 717; Towns v. Wentworth, 11 Moo. P. C. 526; Smyth v. Power, I. R., 10 Eq. 192.

"And this is the case, though the children included under the prior limitations may be sons only and not daughters, and though the prior estates may be in tail male. Turke v. Frenchman, 2 Dyer 171, 1 And. 8; Baker v. Tucker, 11 Ir. Eq. 104, 3 H. L. 106.

"*Quære*, whether it makes any difference in the construction of the gift over in default of issue that the ancestor has children living at the date of the devise. See Doe d. Todd v. Tuesbury, 8 M. & W. 514, commented on in 4 E. & B. 730.

"2. If, however, the prior limitations include less than the whole number of sons, the referential construction will not be adopted. Langley v. Baldwin, 1 Eq. Ab. 185, pl. 29, cit. 1 P. W. 759; A. G. v. Sutton, 1 P. W. 753, 3 B. P. C. 75; Stanley v. Lennard, Amb. 355, 1 Ed. 87; Key v. Key, 4 D., M. & G. 73.

"The referential construction is, however, more readily adopted where the limitations are to some of the issue at twenty-one, and there is a gift over in default of issue who attain twenty-one. Sanders v. Ashford, 28 B. 609.

"3. If the failure of issue is restricted to failure at the death of the parent, the referential construction will not be adopted, as it might have the effect of diverting the interests of children who had died before the tenant for life, leaving children. Westwood v. Southey, 2 Sim. (N. S.) 192; Ex parte Hooper, 1 Dr. 264; Re Tookey's Trust, 21 L. J., Ch. 402.

"4. If the gift is to A for life, then to such issue as he should appoint by will, and if A dies without issue over, issue in the gift over is held to refer to the issue before mentioned, that is to say, issue living at the death of A. Target v. Gaunt, 1 P. W. 432; Hockley v. Mawbey, 1 Ves., Jun., 143; 3 B. C. C. 82; Leeming v. Sherratt, 2 Ha. 14; Hanan v. Drew, 10 Ir. Eq. 333; Eastwood v. Avison, L. R., 4 Ex. 141.

"5. When the limitations to issue are contingent upon attaining a certain age, it seems the referential construction would not be adopted. Doe d. Rew v. Lucroft, 1 M. & Sc. 573, 8 Bing. 386; Franks v. Price, 6 Sc. 710, 5 Bing. N. C., 3 B. 182.

"6. In wills, before the wills act, where the devise to children is without words of limitation, so that they only take estates for life, the referential con-

(c) *Ante* vol. I., p. *254.

that construction is evidently stronger than where (as in reference to *real* estate) they have the effect of creating an estate tail, on which a remainder can be limited.

In regard to personal estate.

*II.—*In regard to personal estate*, it seems to be clear that words denoting a failure of issue, following a bequest to *children*, refer to the objects of that gift.

As in Doe d. Lyde *v.* Lyde, (*d*) where a term of years was bequeathed

struction will not be adopted, but the parent will take an estate tail in remainder after the life estates. Parr *v.* Swindells, 4 Russ. 283. Bennett *v.* Lowe, 5 M. & Pay. 485, 7 Bing. 535, is not inconsistent with this rule, since the gift over was not upon an indefinite failure of issue; and Wight *v.* Leigh, 15 Ves. 564, which conflicts with the latter branch of this rule, would probably not now be followed.

"C. Similar rules apply to personalty.

"1. Thus, in a bequest to A for life, and then to his children, and if A dies without issue over, the gift over refers to the failure of the objects of the prior gift. Doe d. Lyde *v.* Lyde, 1 T. R. 593; Salkeld *v.* Vernon, 1 Ed. 64; Robinson *v.* Hunt, 4 B. 450; In re Wyndham's Trusts, L. R., 1 Eq. 290; In re Sanders' Trusts, Ib. 675.

"'If there be no child there can be no other issue, and if there be a child, the child will take the whole, and there will be nothing to limit over.' Per Turner, L. J., Pride *v.* Fooks, 3 De G. & J. 252.

"2. But where the prior gifts to the children are not vested so that there may be issue who may not take under them, for instance, children of children who die before the time of vesting, it is less easy to admit the referential construction, and it seems that without some further indications to be collected from the will it will not be adopted. Pride *v.* Fooks, 3 De G. & J. 252; Walker *v.* Mower, 16 B. 365.

"And the same is the case where the gifts to the children are only to arise upon a contingency, as for instance, if the legatee marries. Andree *v.* Ward, 1 Russ. 260; Campbell *v.* Harding, 2 R. & M. 390, 2 Cl. & Fin. 431, 8 Bl. (N. S.) 469.

"3. But if there is anything to assist the referential construction it will be adopted. See Malcolm *v.* Taylor, 2 R. & M. 416, where this construction was assisted by the devise of the realty.

"4. And when there is elaborate provision made for the issue of children dying before the time of vesting and born within the limits of perpetuity, a gift over in default of issue may very well be referred to the prior limitations. Ellicombe *v.* Gompertz, 3 M. & Cr. 127; Trickey *v.* Trickey, 3 M. & K. 560.

"5. The referential construction will not be adopted where the bequest is in joint tenancy to A and her children, with a gift over in default of issue. In this case the whole is already disposed of, whether children are born or not, and in the absence of some further indication of intention, there can be no reason for attempting to make the gift over valid in order to divest absolute interests. Fisher *v.* Webster, 14 Eq. 283." Theobald on Wills 384, *et seq.*

(*d*) 1 T. R. 593. See also [Att.-Gen. *v.* Bayley, 2 B. C. C. 553]; Vandergucht *v.* Blake, 2 Ves., Jr., 534; Farthing *v.* Allen, 2 Mad. 310 (but as to which see *post*); [Robinson *v.* Hunt, 4 Beav. 450; Cormack *v.* Copous, 17 Beav. 397; In re Wyndham's Trusts, L. R., 1 Eq. 290; per Parker, V. C., Bryan *v.* Mansion, 5 De G. & S. 737. But see also per Lord Cottenham, *post* p. *451, and per Turner, L. J., *post* p. *453, and 4 D., M. & G. 88.]

to G. for life, and after his decease to M. for life, and after the decease of the survivor to *the children of G.*, share and share alike, and *if G. died without issue* of his body, then over; it was held that there being no child of G. the ulterior gift took effect. 3

Preceded by a bequest to *children;*

So, in Salkeld *v.* Vernon, (*e*) where a testator bequeathed £1000 to his daughter R.'s child or children, to the number of *four;* and if she should have a greater number than four living at his decease, then he bequeathed £4000 to be divided among the said children *who should be so living at his decease*, to be paid at twenty-one; *but if his daughter should happen to die "without issue,"* then he bequeathed the said legacy over. It was contended that the ulterior bequest was void, being after a general failure of issue; but Lord Northington held that it was a legacy to the children, if there were any, living at his decease, and, if not, to the substituted legatees.

—by a bequest to children living at testator's death.

And a similar doctrine prevailed in Malcolm *v.* Taylor, (*f*) though the trust for children was confined to those who attained a prescribed age; but the construction was considered to be aided by an expression in the context. The testator gave certain lands and all the residue of his money in the funds to his mother and his sister M., for their lives and the life of the survivor, and, after the decease of the survivor, to such of the children of M. as she by deed or will should appoint; and, in default of appointment, to be equally divided among the said children their heirs and assigns; the funded property to be an interest vested in and paid to them or the survivors or survivor, being sons at twenty-one, or being daughters at twenty-one or marriage. And *in case M. should die without issue of her body lawfully begotten*, then the testator devised the estate to the children of A in fee; and in case M. should *die without issue as aforesaid*, the testator gave the residue of his money in the funds to J., and after his decease to his (testator's) eldest son. M. died unmar*ried; whereupon a doubt arose as to the validity of the bequest over to J., which of course failed if the words referred to an extinction of issue at any time. It was held by Sir J. Leach, M. R., and afterwards by Lord Brougham, that the words "without issue as aforesaid" meant without such issue of M. as were objects of

"Without issue as aforesaid," held to refer to objects of prior contingent gift.

3. Chism *v.* Williams, 29 Mo. 288.
(*e*) 1 Ed. 64.
(*f*) 2 R. & My. 416.

the preceding gift of the funded property, *i. e.*, the children; his Honor observing, that it was a reasonable intendment that a subsequent limitation is meant to take effect upon failure of the prior gift, and is a substitution in that event. This was the plain intention of the testator with respect to the real estate; and it was to be supposed, when real and personal estate were given together, that the testator had the same intention with respect to the funded property and the real estate. In Lord Brougham's judgment there is much criticism on the words "as aforesaid," (*g*) which he considered to refer, not to the objects of the immediately preceding devise, but to the more remote antecedent, the legatees of the stock, which seems to have been rather a nice question.

Where the prior gift is expressly to "issue," though restricted by the context to issue of a particular class, or existing at a prescribed period, it seems more obvious to apply to the objects of such prior gift the words importing a failure of issue (the term being identical in both clauses), than where the prior gift is in favor of *children*.

Words held to be referential to prior gift to "issue."

Thus, in Leeming *v.* Sherratt, (*h*) where a testator bequeathed to each of his children £1000, to be paid at twenty-one, but as to the girls one-half to be placed out at interest, to be secured from the control of any husband, the interest in the meantime to be paid to them, and the principal to be disposed of in such manner as they might direct to their *issue; but in case they should die without issue*, the testator gave the principal among the survivors of his children; Sir J. Wigram, V. C., was of opinion that the original bequest applied to issue living at the death of the children, and that the gift over, on the failure of "issue," referred to the same objects.

Words held in an executory trust not to refer to prior objects.

In two earlier cases, however, a different construction seems to have prevailed. Thus, in Andree *v.* Ward, (*i*) where a sum of *£5000 stock was bequeathed to A for life, and in case he should marry any woman with £1000 fortune, then the testator's will was that the £5000 should be settled on his wife and the *issue of such marriage;* but in case A died *leaving*

[(*g*) As to these words, see also Walker *v.* Petchell, 1 C. B. 65, stated *post* p. *458.]

(*h*) 2 Hare 14, [following Target *v.* Gaunt, 1 P. W. 432, and Hockley *v.* Mawbey, 1 Ves., Jr., 143, both stated ch. XLI., § 3, sub-s. 3.

(*i*) 1 Russ. 260. [In Allanson *v.* Clitherow, 1 Ves. 24 (an executory trust of realty), the gift over on death without issue was also held non-referential in like circumstances.]

no issue of his body lawfully begotten, then over: Sir T. Plumer, M. R., was of opinion that "issue" in the ulterior gift could not be confined to issue of such marriage as before mentioned, and that therefore A having left issue not of such a marriage, the gift over failed.

The strong tendency of the recent cases towards the referential construction suggests a doubt whether the doctrine of this case would now be followed.

Referential construction rejected.

So, in Campbell *v.* Harding, (*k*) where a testator bequeathed to his adopted daughter, Caroline H., £20,000 consols, and his house and landed property at Culworth; *but in case of her death without lawful issue*, then the testator willed the money so left to her to be equally divided betwixt his nephews and nieces who might be living *at the time*, (*l*) and the land, &c., at Culworth to his nephew J. H.; and the testator requested his friends C. and S. to be guardians for Caroline H., and if she married it must be with their consent, and "the property to be solely settled *upon herself and her children*, and in no way charged or alienated." It was contended that the words "death without lawful issue" in this case meant death without having had any such issue as would have taken under the settlement subsequently directed by the testator, and not death without issue indefinitely; but it was held by Sir L. Shadwell, V. C., and afterwards by Lord Brougham, and ultimately in D. P. (where the case was very elaborately argued), that the words could not be restricted, and consequently that Caroline H. (who had died unmarried) became absolutely entitled to the stock. Lord Brougham considered that the introduction of the direction to settle the stock on the marriage of the legatee did not vary or affect the construction which was to obtain in the alternative event of her not marrying at all. (*m*)

(*k*) 2 R. & My. 390, 8 Bli. (N. S.) 469, 2 Cl. & Fin. 421 (Candy *v.* Campbell.)

(*l*) See S. C., cited ch. XLI., § 3.

(*m*) This case was cited as a leading authority by K. Bruce, V. C., in Pye *v.* Linwood, 6 Jur. 618; [and by Bacon, V. C., in Fisher *v.* Webster, L. R., 14 Eq. 283. But in the former] case it was unnecessary in the events which had happened to decide whether the words importing a failure of issue applied to the objects of the preceding bequest to "children" or extended to issue indefinitely; the case therefore has really no connection with the present subject of discussion. The material question was, whether the words referred to issue living at the death (*vide* next chapter), which construction the court (it is considered most properly) negatived. [In Fisher *v.* Webster, the prior bequest being to A and her children jointly, the simply referential construction of the gift over if A should die without issue was of course inapplicable.]

*The frame and language of the will in this case were peculiar, and it must not be considered as intrenching on the general principle of construction exemplified in the preceding cases. That principle was recognized and forcibly stated by Lord Cottenham in Ellicombe *v.* Gompertz, (*n*) where he held that the words "from and immediately after the decease of all the sons and grandsons of my said son J. J." were confined to such sons and grandsons as were embraced by the preceding gifts, a construction which supported the validity of the ulterior gift. (*o*) He thus stated the general doctrine: "Provision is made for certain members of a class answering a particular description, and then a gift over is made on failure of the class. If it be clear that the whole of the class were not to take, the gift over, though made to depend on the failure of the whole class, will be construed to take place upon the failure of that description of the class who were to take; and, on the other hand, if it appear that all the class were intended to take, although some only are enumerated, and the gift over be upon the failure of the whole class, the court will adopt such a construction as will extend the benefit in the best way the law will admit to the whole class."

Remark on Campbell v. Harding.

Lord Cottenham's statement of the general doctrine.

So, in Trickey *v.* Trickey, (*p*) where a testator bequeathed the residue of his personal estate to his daughter A for life, and after her decease to her children at twenty-one; and in case any of such children should die under twenty-one, and have one or more children *who should survive A* and live to attain the said age, the last-mentioned children should be entitled to their parents' share; provided that, in case any child of A should die under twenty-one, his, her or their share or shares should go to the survivors of the said children, and the issue of any deceased child or children who should marry and die under the said age; provided further, that *if there should be no child of A, or there being any such, no one child living to attain the age of twenty-one years, nor leave any issue who should attain thereto, then over:* Sir J. Leach, M. R., held that the gift over must be intended to take effect on failure of the former gifts; and as such former gifts were confined to those grandchildren who should survive (and who should therefore necessarily have been born in the lifetime of) the daughter, the ulterior bequest was valid. (*q*)

Words held to refer to objects of prior gifts.

(*n*) 3 M. & Cr. 127.

(*o*) The will was found too long and special for insertion.

(*p*) 3 My. & K. 560.

(*q*) Although in Ellicombe *v.* Gompertz, and Trickey *v.* Trickey, above

*[In Westwood *v.* Southey, (*r*) a very material distinction was drawn by Sir R. Kindersley regarding those cases where, by express direction, or by the true construction, of the will, the death of the first taker without issue means without issue living at his death. (*s*) He said: "It is true that where there is a legacy to one for life, and after his death to his children, with a gift over if he die without issue, and there is nothing to restrain those words, the words 'without issue' are limited to the issue before mentioned. But the ground on which the court has used violence with the words and interpolated the word 'such' is this, that if there were no restriction on the generality of the words 'dying without issue,' the limitation over would be void. But when the dying without issue is either in terms, or by the proper construction, limited to dying without issue living at the death, there is no reason for interpreting the words as meaning 'such issue as before mentioned.' I am not aware of any case in which a legacy being given to one for his life, with remainder to his children, and a gift over if he dies without issue, in the sense of issue living at his death, the limitation has been restricted to issue before mentioned. Such a construction might, in fact, wholly defeat the testator's intention; for the tenant for life might have an only child who might attain twenty-one, marry and have children, and die before the tenant for life, and then the child and the issue of that child would be excluded." In the case before him the V. C. acted upon the distinction, although the effect was to divest a previously vested gift to the children.

Suggested distinction where the gift over is on death without issue living at the death.

In Pride *v.* Fooks, (*t*) where the bequest was in trust for *such* child or children *as* the testator's niece and two nephews should *leave at the time of their respective deceases*, one-third to the child or children of each (but not giving life interests to the parents), and in case the niece or either of the nephews should happen to die without leaving any

stated, the expression which connected the prior and ulterior gifts did not correspond with that which is the subject of the present chapter; yet, as the general principle was much discussed, and as these cases exemplify the application of the doctrine to bequests of personalty, they appeared to call for insertion in this place. Ellicombe *v.* Gompertz was cited as a leading authority by Sir J. Wigram, in Leeming *v.* Sherratt, 2 Hare 14, *ante* p. *449; [see also Hillersdon *v.* Lowe, 2 Hare 355; Cardigan *v.* Curzon-Howe, L. R., 9 Eq. 358 (settlement of family plate.)

(*r*) 2 Sim. (N. S.) 202. See also Walker *v.* Mower, 16 Beav. 365.

(*s*) The V. C. repeated this statement of the rule in Madden *v.* Ikin, 2 Dr. & Sm. 213. So Parker, V. C., Bryan *v.* Mansion, 5 De G. & S. 737.

(*t*) 4 Jur. (N. S.) 678, 3 De G. & J. 252.

children or child lawfully begotten, her or his third part to be paid to the children or child of the other *or others leaving children or a child, in equal proportions if more than one, and in case all of them the nephews and niece should happen to die *without leaving* (*u*) *any issue* lawfully begotten, in trust for the children of X. then living and the issue of his children then dead, equally *per stirpes*. Neither of the nephews left any child at his death, nor did the niece, but the niece left grandchildren. It was held by Sir J. Romilly, M. R., that "issue" in the gift over was not to be restricted to "children," and that there was an intestacy. He approved and relied much on the V. C.'s distinction. On appeal, the decision was affirmed by K. Bruce and Turner, L. JJ., upon the construction of the particular will, "children" being strongly contrasted with "issue," and there being, not a series of limitations to take effect in succession, but only two sets of concurrent contingent limitations. Sir G. Turner said he would not give any opinion upon Westwood *v.* Southey.

Statement of the general doctrine by Turner, L. J.

Referring to the general doctrine, the L. J. said: "Amongst the cases on the point, which are almost innumerable, may be placed on the one side Malcolm *v.* Taylor and Ellicombe *v.* Gompertz, and on the other Andree *v.* Ward and Campbell *v.* Harding. If the primary limitation be in favor of children, and be so expressed that they take immediate vested interests, and there be a limitation over in default of issue, it is not difficult to see reasons for construing default of issue to mean default of children; for if there be no child, there can be no other issue, and if there be a child the child will take the whole, and there will be nothing to limit over; but where the primary limitation is so expressed that there may be issue who may not take under it, as in the case of gifts to children to vest at twenty-one, it is not so easy to see the reasons on which this construction has prevailed. It is true that by adopting the construction the limitations are made to follow in regular order and succession, but it is equally true that the general terms in which the limitation over is expressed, prove that there has been some omission or some mistake on the part of the testator, and the difficulty seems to be to determine what the omission or mistake has been, whether it has been in the gift over not having been limited, or in the primary gift not having been extended." He had endeavored to extract some definite rule from the authorities, but the result of them was that each case

(*u*) This as to personalty means leaving at their deaths, see ch. XLI., § 1.

depended on the construction of the particular will, and that no general rule could be laid down.

*But of course, although the primary gift is so expressed that there may be issue who may not take under it, the context may show that the omission or mistake is not in that gift, but in the gift over. This was considered to be the case in In re Merceron's Trusts, (x) where a testator gave a legacy to each of his two daughters for life, and after her death unto and equally among all and every such child and children she might happen *to leave at her decease;* and in case she should *die without issue,* then to such persons and in such manner as she should by will appoint. The will then contained a gift of residue to the testator's son. The daughter died leaving grandchildren but no child living at her death. It was held by Sir R. Malins, V. C., that "die without issue" meant such issue as was before mentioned, namely, children living at the daughter's decease; and, there being none, that the power to appoint had arisen. The V. C. thought it perfectly clear that, as the children of the daughters who were the primary objects of the disposition could not take, the next object of the testator's bounty was the daughter herself, who, if she had no children or only children who could not take, was to have the absolute dominion over the fund.]

In default of *such* issue.

Where the words are not "in default of issue" simply, but "in default of *such* issue," it is clear that whatever be the class of issue included in the preceding gift, whether children, sons, or daughters, and whatever the extent of interest given to those objects, the bequest over *in default of such issue* is construed to mean in default of such *children, sons, or daughters.* (y) [And if the prior gift is confined to children who survive their parent, a gift over in default of such issue, or (which is the same) of issue *becoming entitled,* means in default of children who survive their parent.] (z)

In regard to real estate.

"Default of *such* issue."

III.—1. With regard to *real estate* also, it is clear that the words "in default of *such* issue," following an express devise to any particular branch of issue, as *children, sons, or daughters,* will be construed to refer to the issue before described; that is, as meaning in default of "*such*" *child-*

(x) 4 Ch. D. 182 (will dated 1838, as to which *vide post* § 4 of this ch.)]

(y) Maddox *v.* Staines, 2 P. W. 421, 3 B. P. C. Toml. 108; Stanley *v.* Leigh, 2 P. W. 685; and see 3 M. & Cr. 153.

[(z) In re Hopkins' Trusts, 9 Ch. D. 131.]

ren, sons, &c. (*a*) And in cases of *this* class (as distinguished from those which form the *subject of the next section), this rule prevails, whether the objects of such preceding devise take estates of inheritance, or only estates for life. (*b*) [4]

The reported cases supply numerous examples of each kind.

Preceded by a devise to children in fee;

In Doe d. Comberbach *v.* Perryn, (*c*) Rex *v.* Marquess of Stafford (*d*) [and Foster *v.* Hayes] (*e*) the words "in default of *such* issue" following a devise to *children in fee* were held to refer to such children.

—to children for life;

In Doe d. Tooley *v.* Gunniss (*f*) and Doe d. Liversage *v.* Vaughan (*g*) the same construction was given to a devise to children (without words of limitation), with a devise over "on *failure of such issue;*" and also in Ashley *v.* Ashley, (*h*) where a similar devise was followed by the words, for "want of such issue."

—to daughters for life;

In Denn d. Briddon *v.* Page (*i*) the limitations of the will were to the first and other sons in tail male in strict settlement, and in default of such issue to all and every *the daughters* (without words of limitation), *and in default of such issue,* over; Lord Mansfield held that the daughters took estates for life only; but he said, "If, after the limitation to the daughters, the words had been, 'and if they die *without issue,*' we would have implied an estate tail; (*j*)

(*a*) Lethieullier *v.* Tracey, Amb. 204, 220; Denn d. Briddon *v.* Page, 11 East 603, n., 3 T. R. 87, n.; Hay *v.* Lord Coventry, 3 T. R. 83; Doe d. Comberbach *v.* Perryn, Id. 484; Goodtitle d. Sweet *v.* Herring, 1 East 264; and other cases, *ante* p. *382.

Meaning of words "in default of issue."—(*b*) A limitation over in default of issue, following an estate in fee to children or any other particular branch of issue, operates as an alternative contingent remainder which is defeated the moment that, by birth of a child or other issue taking under the previous limitation in fee, such limitation in fee becomes vested. On the other hand, a limitation over in default of issue, following an estate for life or in tail given to the issue, is construed as a vested remainder expectant on the estate for life or in tail, and is not defeated by the birth of issue, but takes effect upon the determination of the estates for life or in tail limited to them. It is clear, therefore, that, according as the issue take, (1) in fee, (2) in tail, or (3) for life, the words in default of issue mean,—(1) if there never are any issue; (2) if there never are any issue, or being such, upon their deaths and the failure of their issue inheritable under the estate tail; (3) if there never are any issue, or being such, upon their deaths.]

4. Torrance *v.* Torrance, 4 Md. 11; Tongue *v.* Nutwell, 13 Id. 415; Edelen *v.* Middleton, 9 Gill 161.

(*c*) 3 T. R. 484.

(*d*) 7 East 521.

[(*e*) 2 Ell. & Bl. 27, 4 Ell. & Bl. 717.]

(*f*) 4 Taunt. 313.

(*g*) 1 D. & Ry. 52, 5 B. & Ald. 464.

(*h*) 6 Sim. 358.

(*i*) 3 T. R. 87, n., 11 East 603, n.

(*j*) See Wight *v.* Leigh, 15 Ves. 564; Parr *v.* Swindels, 4 Russ. 283; both stated *post.*

but here the words are '*such* issue,' *which can only mean the issue before mentioned.*" Hay *v.* Earl of Coventry (*k*) was precisely similar.

So, in Doe d. Phipps *v.* Lord Mulgrave, (*l*) where the devise being to the first and every other son in tail male, "*failure of such issue*" over, the latter words were treated as merely referring to the preceding devise.

—to sons in tail male;

Again, in Foster *v.* Romney, (*m*) where the devise was to A *for life, and after his decease to *his sons* successively (without words of limitation), and *in default of such issue*, over; it was held that A and his sons took for life only, the words "*such* issue" meaning such *sons*.

—to sons for life.

These decisions must be considered as overruling Lomax *v.* Holmden, (*n*) and Evans d. Brook *v.* Astley, (*o*) unless the latter cases can be referred to their special circumstances. Lord Kenyon (*p*) certainly so treated the latter. Robinson *v.* Robinson, (*q*) would be in the same predicament, were it not that the word "*son*," in the devise in that case, appears to have been regarded as a word of limitation, (*r*) and consequently the first taker was properly held to be tenant in tail, without imposing on the subsequent words, "in default of *such* issue," the office of conferring that estate, to which, indeed, upon every sound principle of construction, they appear to be inadequate. The cases just stated, establishing that expression to be purely referential, are decisive authorities against the stress which in some parts of the discussion of Robinson *v.* Robinson was laid on these words.

Remarks on Robinson *v.* Robinson, Roe *v.* Grew, Frank *v.* Stovin.

[So where there was a devise to one for life, remainder to her sons and daughters in fee, but should she die without having *such heirs*, over, the words "such heirs" were held to refer to the sons and daughters.] (*s*)

"Such heirs" preceded by gift to sons and daughters in fee.

Of course where the word "issue," occurring in an express devise to issue, is therein explained to mean *children*, the words *in default, or*

(*k*) 3 T. R. 83.

(*l*) 5 T. R. 320.

(*m*) 11 East 594. See also Goodright d. Lloyd *v.* Jones, 4 M. & Sel. 88; Purcell *v.* Purcell, 2 D. & War. 219, n.; [Bridger *v.* Ramsey, 10 Hare 320; Bevan *v.* White, 7 Ir. Eq. Rep. 473; In re Arnold's Estate, 33 Beav. 163; In re Pollard's Estate, 3 D., J. & S. 541.]

(*n*) 1 Ves. 296.

(*o*) 3 Burr. 1570.

(*p*) 3 T. R. 87.

(*q*) 1 Burr. 38, 3 B. P. C. Toml. 180.

(*r*) See Lord Kenyon's judgment in Doe *v.* Mulgrave, 5 T. R. 323.

[(*s*) Polley *v.* Polley, 29 Beav. 134.]

for want of such issue, immediately following, are construed in default of such *children*. (*t*)

"Such issue" preceded by a devise to first and other sons and their heirs.

But in one instance the word "such issue," preceded by a devise to first and other *sons* and *their heirs*, were held to refer to *the heirs* of the sons. Thus, in Lewis d. Ormond *v.* Waters, (*u*) where the devise was to the testator's eldest son for life, remainder to a trustee to preserve contingent remainders, remainder to *the first and other sons of the testator's eldest son and their heirs*, and *for want of such issue*, to his second son B for life, with similar remainders; it was held that the word "issue" in the limitation over referred to the *heirs of the sons*, and consequently that they took successive *estates tail*, which would effectuate *the apparent intention of the testator to continue the estates in his family.

Remark on Lewis v. Waters.

This is a strong case, inasmuch as there was an antecedent class of issue to which the clause might have been applied; but as the words "first and other" evidently imported that the sons were to take *successively*, (*x*) there was no mode of giving effect to that intention except to cut down the fee-simple of the sons to an estate tail.

"Such issue" controlled by subsequent clause showing an estate tail to be intended.

[Again in Biddulph *v.* Lees (*y*) a devise to A for life, and to his sons in tail male successively, and for default of such issue to B and C and their sons in like manner; and for default of such issue to the daughters of A and their heirs forever as tenants in common, and for *default of such issue* to the daughters of B and C in like manner (which it was admitted by the court would *per se* have given an estate in fee simple to the daughters of A) was held to create an estate tail in the daughters on the ground that the testator had expressly interpreted his meaning by a shifting clause which provided that if any daughter became a nun, the use declared in her favor should cease, and that "the person next in reversion to take according to the aforesaid limitation should, immediately thereupon, enter upon and enjoy the premises as he would have been entitled to hold and enjoy the same in case the person so entering into religion had been then dead without issue of her body."]

In Ginger d. White *v.* White (*z*) Willes, C. J., read a devise to chil-

(*t*) Ryan *v.* Cowley, 1 Ll. & G. 7.

(*u*) 6 East 337.

(*x*) See Kershaw *v.* Kershaw, 13 Ell. & Bl. 845; Cradock *v.* Cradock, 4 Jur. (N. S.) 656, *ante* p. *253. As to the force of "successively," see Ginger *v.* White, *infra*.

(*y*) Ell., Bl. & Ell. 289.

(*z*) Willes 352, stated *post* p. *459.

dren and their heirs *successively* as conferring an estate tail only, (*a*) though he distinctly held, as we shall presently see, that the subsequent words, importing a failure if issue, referred to the children themselves. (*b*) He seems even to have thought that a gift over in default of *male* children to *female* children, and in default of female children to a person who was their cousin, explained heirs to mean *heirs of the body*, "because the male children could not die without heirs if any of their sisters were living, and the female children could not die without heirs if the cousin were living:" (*c*) but he evidently confounded *a remainder* with an *alternative limitation;* in other words, he failed to distinguish between a devise over if the children should die *without heirs, and a devise over if there should be *no* children. With the latter the doctrine to which he refers has no connection.

Remarks on doctrine advanced in Ginger *v.* White.

Even where the prior devise embraces a single child only, the words "for want of such issue" are construed for want of such *child*, and have not the effect of conferring an estate tail on the parent of that child. (*d*)

Effect where prior devise is in favor of a single child.

[The words "as aforesaid" may have the same force as the word "*such*." Thus, in Walker *v.* Petchell (*e*) the testator devised land in trust for his wife for life, remainder in trust for all and every such one or more of the child or children whether male or female of the said wife lawfully begotten, for such estates, &c., as the wife should appoint, and in default of appointment, in trust for the children as tenants in common in fee, "but in case his wife should happen to die without leaving lawful issue as aforesaid," then over; it was held that the words "issue as aforesaid" meant children, and, therefore, that the gift over was not too remote.]

Words "as aforesaid" equivalent to "such."

In this state of the authorities, then, the proposition seems undeniable that the phrase "in default of such issue," "for want of such issue," or "on failure of such issue," following a devise to any class of issue, or even to any individual child or other descendant, is simply and exclusively referential, and does not enlarge or in any manner affect any of the prior estates. [It

General position deducible from the cases.

(*a*) See also Hennessey *v.* Bray, 33 Beav. 96, *ante* p. *325.

(*b*) See *post* p. *459.

(*c*) See as to this doctrine, *ante* p. *329.

(*d*) Doe *v.* Charlton, 1 Scott N. R. 290, 1 M. & Gr. 429, *ante* p. *408; [Boydell *v.* Golightly, 14 Sim. 327; Ashburner *v.* Wilson, 17 Sim. 204.

(*e*) 1 C. B. 652.

Doe v. Taylor, opposed to other cases.

is true that in Doe d. Harris *v.* Taylor (*f*) it was held on the authority of Evans *v.* Astley, (*g*) which is overruled, and of Clements *v.* Paske, (*h*) which it is submitted is not in point, that the words "for default of such *first* issue" did not mean for default of such "*first* son" as took under the previous limitation, but "for default of issue of such first son," and therefore that the first son took an estate tail. But Sir J. Romilly, M. R., declined to follow this decision, (*i*) and it is submitted that it cannot be supported.

Referential construction excluded by context.

In Chorlton *v.* Craven, already stated, (*j*) it was impossible to read the gift over "for want of *such* lawful issue of the name of C. either by Thomas or James" as simply referring to the sons who were objects of the preceding devise, for the sons of James were not objects of that devise. The intention, it was said, *plainly was that the estate should not go over to the daughters until all the issue male of Thomas had been provided for; to effectuate which it was considered an estate tail might be implied in Thomas in remainder after the estate tail male previously limited to his sons. (*k*) Sufficient operation it was thought was given to the word "such" by referring it to the word "male" in the previous devise—the intention that Thomas' entail should descend in the male line, being also manifested by the express desire to preserve the name of C. This construction by parity of reasoning enabled them to give the same estate tail in remainder to James, (*l*) and the ultimate remainder to the daughters followed as a vested remainder, and completed the scheme of the will.]

In default of issue generally (without the word *such*.)

III.—2. It is well settled also, that words importing a failure of issue (without the word *such*), following a devise to *children* in fee simple or fee tail, refer to the objects of that prior devise, and not to issue at large.

Thus, in Ginger d. White *v.* White, (*m*) where a testator devised a

(*f*) 10 Q. B. 718.

(*g*) *Ante* p. *456.

(*h*) *Ante* vol. I., p. *491, n.

(*i*) In re Arnold's Estate, 33 Beav. 163.

(*j*) *Ante* p. *407, and (same devise) Parker *v.* Tootal, 11 H. L. Cas. 143.

(*k*) This construction was thought to have the greater weight as it accounted for the antecedent decisions of K. B. and of Lord Eldon; but, as already stated, no final opinion was expressed upon it, *ante* p. *408, n. (*l*).

(*l*) As to this see vol. I., p. *559.]

(*m*) Willes 348; [Cormack *v.* Copous, 17 Beav. 397; Peyton *v.* Lambert, 8 Ir. Com. Law Rep. 485; Towns *v.* Wentworth, 11 Moo. P. C. C. 526.]

house to his son J. (subject to an undivided interest given to a daughter during widowhood), and after the determination of that estate to the *male children of* J. successively, one after another, as they should be in priority of age, *and to their heirs;* and in default of such male children, to the *female children of J. and their heirs;* and *in case J. should die without issue*, then over to the testator's grandson W. and his heirs. One question was, whether the last words in italics did not give an estate tail by implication; and it was held that they did not. Willes, C. J., said that the word "issue" meant *such issue as the testator had mentioned before*, and he could mean no other, for he had devised the estate before to all J.'s sons and daughters. It seems that the learned judge considered that the children took estates *tail*, on a ground which has been already alluded to. (*n*)

Words held to refer to children objects of prior devise.

So, in Goodright d. Docking *v.* Dunham, (*o*) where a testator devised to his son J. for life, and after his death to all and every his *children* equally *and their heirs;* and in case his son died **without issue*, then unto his (the testator's) two daughters and their heirs; Lord Mansfield without hesitation held that the limitation over was the same as if it had been "in case the son had died without *children*."

Again, in Malcolm *v.* Taylor, (*p*) where a testatrix devised (among other things) the moiety of an estate in Jamaica to her mother, and her sister Maria Taylor, for their lives, and the life of the survivor, and after the decease of the survivor, to such of the children of Maria Taylor as she by deed or will should appoint; and in default of appointment, then the said moiety to be divided equally between the said children, their heirs and assigns forever; and if but one then to such one child, his or her heirs and assigns forever; *and in case the said Maria Taylor should die without issue of her body lawfully begotten*, then the testatrix devised the moiety in question over to other persons: it was considered clear that these words referred to the children who were the objects of the prior devise. (*q*)

(*n*) *Ante* p. *457.

(*o*) Doug. 264.

(*p*) 2 R. & My. 416. See also Doe *v.* Selby, 2 B. & Cr. 926, *ante* vol. I., p. *876; Tarbuck *v.* Tarbuck, *post* p. *462; [Hale *v.* Pew, 25 Beav. 335; Maden *v.* Taylor, 45 L. J., Ch. 569, 572.]

(*q*) In the unreported case of Clonmert *v.* Whitaker, (8th August, 1807, MS., with a note of which the author has been favored,) a testator devised unto his three sons, Thomas, George and John, share and share alike, all his freehold, leasehold and personal estate and effects. And he also further bequeathed, that, in case of the demise of either of his said sons, the

"Default of issue" referred to issue taking previous estates tail.

[So, in Baker *v.* Tucker, (*r*) where the devise was to the testator's natural son John for life, with remainder to the first and other sons of John successively in *tail male*, and in default of *such* issue, to the daughters of John and their heirs as tenants in common and *in default of issue of the said John*, to the testator's *right heirs; it was urged that, wherever any chasm of events occurs between the actual limitations to the children, and that upon which the gift over is made to depend, an estate tail in the parent whose issue is referred to in the gift over ought to be implied to fill up the chasm, and that an estate tail general ought therefore to be here implied in John to fill up the chasm occasioned by the absence of a provision for the female issue of his sons; such estate to be in remainder after the estates expressly given to his daughters, which for that purpose must be cut down to estates tail. (*s*) But it was held in D. P. that the case was covered by Blackborn *v.* Edgley, (*t*) where, the limitations being precisely similar (except that the limita-

said estate should be equally divided between his surviving sons; and if his sons had issue, *his* (the son's) *child or children should be entitled to the father's share. And in case they all died without issue*, then his freehold estate or estates situated in South street, Peckham, should devolve to the heirs of his late brother Thomas, to be equally divided. The three sons suffered a common recovery, and the question, on a bill for specific performance filed by a person who claimed under the recovery and had contracted for the sale of the estate, was, whether the fee simple was acquired by their recovery. The judges of C. P. (on a case from chancery) certified that Thomas, George and John, who suffered the recovery, took such an estate as would have enabled them to make a good title, whereupon Lord Eldon decreed the specific performance of the contract.

[It seems unnecessary to assume that the three sons were held to be tenants in tail contrary to] the rule of construction deducible from the last three cases. The devise was sufficient to carry the fee to the [three sons] by force of the word "estate;" [and all the subsequent limitations may be read as to be substituted only in case the sons died in the testator's lifetime, leaving their estates absolute if they survived him. But supposing this not to be so, the sons acquired a good title by the recovery *quacunque via:* for if they were tenants in tail the entail was barred by it; if tenants for life with remainder (adopting the referential construction) to their children by purchase, still, as there do not appear to have been any children born when the recovery was suffered, the remainder was destroyed and a fee acquired by the sons.

(*r*) 3 H. L. Cas. 106.

(*s*) Citing Doe *v.* Halley, 8 T. R. 5, stated *post*.

(*t*) 1 P. W. 600. This case was alleged *arg.* to be misreported, and extracts from R. L. were cited to show that the gift over there was one from which in no case could an estate tail have been implied. But Lord Brougham observed that if the case had always been supposed to be of one purport, and as such had ruled subsequent cases, it would not do to go back to some critical difference; because the law might have been settled.

tion to the daughters was expressly in tail, and would therefore have required no cutting down in order to admit a remainder by implication), the referential construction prevailed: John therefore took an estate for his life only.

"Die without issue" referred to issue taking previous estates in fee.

Again, in Goymour *v.* Pigge, (*u*) where the testator devised copyholds to his wife for life, remainder to his daughter for life, remainder to the first child of her body whether male or female and to his or her heirs and assigns forever; but if such child should depart this life under the age of twenty-one years without leaving issue of his or her body lawfully begotten, then the testator devised to the second and third child in similar words, and so on to the other children; but in case his daughter should die *without leaving issue of her body* lawfully begotten, or, having issue, such issue should die under the age of twenty-one years without leaving issue lawfully begotten as aforesaid, then he devised the estate over. Lord Langdale considered that the words "issue of the body," when used with reference to the daughter, must be understood to mean the children to whom, subject to the daughter's life estate, the property was previously given.

Whether any different effect attributed to "die without *leaving* issue."

It will be observed that in the last case the devise over was on the devisee for life dying without *leaving* issue, not, as in all that precede it, simply without issue; but the devisee for life never having had a child, the effect of the word "leaving" was not discussed.] It should seem, however, that the introduction of *that word would not vary the construction, inasmuch as the phrases "without issue" and "without leaving issue" have (we shall hereafter find) been held to be undistinguishable, in regard to their importing an indefinite failure of issue in reference to real estate. This remark, however, is made with great diffidence, as it may seem to clash with an opinion expressed by Lord Cottenham (when M. R.), in Tarbuck *v.* Tarbuck, (*x*) where a testator devised his lands at Barnhill to his son James for his life, and after his decease to all the children of James lawfully to be begotten and to their heirs and assigns forever as tenants in common, and if but one child then to such only child his or her heirs and assigns forever. And the testator charged the lands with the payment of an annuity. He then gave all his other

Tarbuck *v.* Tarbuck.

Devise to children in fee followed by

(*u*) 7 Beav. 475.

(*x*) 4 L. J., Ch. (N. S.) 129.]

devise over on death without *leaving* issue.

lands to his son Jonathan and his children in similar terms, also charged with an annuity. *And in case the testator's son James should happen to die without leaving lawful issue*, then the testator gave the lands devised to him to his (testator's) son Jonathan his heirs and assigns; *and in case the testator's son Jonathan should happen to die without leaving lawful issue*, then the testator gave the lands devised to him to his (testator's) son James his heirs and assigns forever. *But if both the testator's said sons should happen to die without leaving lawful issue*, then he gave the whole of the said hereditaments to his nephews and nieces in fee. The testator's sons, James and Jonathan, both died in the testator's lifetime, James leaving a son, who also died in the testator's lifetime. Jonathan died a bachelor. The M. R. held that in these events the devise over failed, on the ground that the son of James would, if he had survived the testator, have taken an estate in fee, and therefore the lapse of such devise, instead of letting in the ulterior devisee, occasioned intestacy. (y) "The first question," said his Honor, "to be considered is, what estates would James and Jonathan have taken had they survived the testator? On the part of the nephews and nieces it was contended that they had estates tail, upon the ground that the gift over, being to take effect in case either died without leaving lawful issue, is postponed until an indefinite failure of issue, and therefore creates an estate tail. This rule has been adopted for the purpose of giving effect to the general intent of the testator, manifested in his devises over depending on a failure of issue generally, in order to give a chance at least of succession to *persons who, though they cannot claim under a particular gift, are included in the general description of issue. That rule does not apply where this object is not to be attained, and amongst the exceptions is the very case which occurs here; namely, a gift to A for life, with remainder to the children of A in fee, that is, the children of A in fee generally, and a gift over on the death of A without issue, which means *such* issue, that is, children. This was the case of Goodright *v.* Dunham, (z) which is precisely in point on this subject. In such cases the general term 'issue' is construed to mean that particular description of issue before specified, namely, children. 5 It was indeed in this case, as it has been

"Issue" held to refer to children, objects of preceding devise.

(y) As to this doctrine, *vide post* ch. L.

(z) *Ante* p. *459.

5. So, too, in Wight *v.* Baury, 7 Cush. 105, 107, where it is said by Shaw, C. J.: "In the manner in which the words are used, 'if she should die leaving no child,' then over, the devise clearly means, not if she should die leaving no issue, look-

in former cases, contended, that such construction is a restricting of the meaning of the term issue, because thereby children's children would be excluded in the event of their parents' death before the testator's death; (a) but this argument has not prevailed against the rational construction of making the gift over depend on the failure of the object before distinctly specified. Such were the cases of Blackborn *v.* Edgley, (b) and Morse *v.* Marquess of Ormonde. (c) I am therefore of opinion, that if James and Jonathan had survived the testator they would have taken estates for life, with remainder to their children in fee, *with gifts over in the event of there being no children at the respective times of the death of the tenants for life.* If they had so survived the testator, it is clear the gift to the nephews and nieces could not have taken effect, for that gift is only to take effect in the event of James and Jonathan not having lawful issue, that is, children according to the above construction; and James, at the time of his death, had a son James who survived both his father and uncle Jonathan."

Lord Cottenham's construction of "die without *leaving* issue."

As in this case the child whose existence was held to have defeated the devise over, survived the parent the devisee for life, it was not necessary to consider whether the words in question meant without having had a child, or without leaving a child living at his decease; and therefore the opinion of the M. R. on this point must be regarded as extra-judicial: and though even *that opinion is entitled to great weight, yet it seems to present a more legitimate subject for critical examination. The construction, it is conceived, is not only unsupported by analogy, but is most inconvenient, as it diverts the interest of a child in the event of his dying before his parent, though he might leave twenty descendants of various

Remark on Tarbuck *v.* Tarbuck.

ing to an indefinite failure of issue; but, as the term naturally imports, leaving no child, *i. e.*, leaving no child to take the estate in remainder, after the devise to the mother for life. But if she did leave any children, then the devise over had no effect, and such children, by force of the devise, took a fee." See also Bowers *v.* Porter, 4 Pick. 198.

(a) But according to Goodright *v.* Dunham, and Malcolm *v.* Taylor, a child on its birth, or at the death of the testator, takes a vested fee, which of course, in the event of that child subsequently dying in the lifetime of the tenant for life, leaving issue, would descend to such issue, if not otherwise disposed of.

(b) 1 P. W. 600, cited *ante* p. *461.

(c) 5 Mad. 99, cited *post* sub-s. 3. The M. R. also, it seems, adverted to the fact of the children of James and Jonathan taking as tenants in common; and on this point cited Doe *v.* Elvey, 4 East 313; Gretton *v.* Haward, 6 Taunt. 94.

"Die without *leaving* issue" held to mean failure of previous estates in fee to issue.

degrees. [It is conceived however that this opinion was virtually overruled in Doe d. Todd *v.* Duesbury, (*d*) where the testatrix devised land to Thomas D. for life, with remainder to his child and children, if only one child then to such child, his or their heirs or assigns, but if more such children then equally to be divided amongst them share and share alike, and to the heirs, executors, administrators and assigns of such children respectively as tenants in common; but in case the said Thomas should happen to die *without leaving lawful issue*, then over. Thomas died without leaving any issue living at his death, but having had children (one of them born at the date of the will) who survived the testatrix, and it was contended on behalf of the devisees over that Thomas took only an estate for life with remainder either to his children as tenants in common in tail with remainder over, or with remainder to the children in fee with an executory devise over in the event of his not leaving issue at his death, which event happened. The Court of Exchequer negatived both constructions, holding that, if the gift over was to be construed as an executory devise limited on the estate to the children, it was too remote as being limited on a general failure of issue. Rolfe, B., delivered the judgment of the court and said, "Whenever the words 'die without leaving issue' have been construed to mean 'die without leaving issue living at the death,' the courts have always relied or professed to rely on some other expressions or circumstances apparent on the face of the will, and have never assumed to act against that which we consider to be a long-established settled rule of construction, namely, that in wills of real estates these words refer to a general failure of issue at any time, however remote."

Observations on Doe *v.* Duesbury.

As the court negatived the only two constructions upon which the plaintiff could recover, it was not necessary for them to say what was the true construction; but the case appears to fall within the decision in Goodright *v.* Dunham, and the words "die without leaving lawful issue" to be referable to such issue of Thomas as before mentioned. The gifts to the children of Thomas and to *the devisees over were thus alternative contingent remainders, and the gift to the children having vested, that to the devisees over failed. It has indeed been said (*e*) that this construction was necessarily excluded, because there was one child already born at

[(*d*) 8 M. & Wels. 514. Ell. & Bl. 730.
(*e*) By Jarvis, C. J., Foster *v.* Hayes, 4

the date of the will, which survived the testatrix: so that no such contingency was possible as Thomas dying *without having had* any children. But this treats the child as *persona designata*, whereas the gift was to children as a class, of which the child existing at the date of the will might or might not turn out to be a member; and if that child had died before the testatrix and no other had been born, it is submitted that the gift over would have taken effect, for there would then have been no object of the preceding devise within Goodright *v.* Dunham.

Remark on Doe *v.* Duesbury.

It must be observed that Tarbuck *v.* Tarbuck was not cited; and that it was not argued that the word "issue" in the gift over ought, by reference to the preceding devise, to be construed *children*. This, however, was Lord Cottenham's construction in Tarbuck *v.* Tarbuck; and the argument would be that "die without leaving *children*" was a phrase not governed by the settled rule to which the court adverted, but was to be taken in its natural sense of "leaving *children* him surviving." But Ginger *v.* White and Goodright *v.* Dunham (*f*) were cited, and it is unlikely that this argument was overlooked by the court. The inconvenience of such a construction has already been pointed out: moreover, it seems to be opposed to that series of cases which have decided that a gift over without *leaving* children following a vested gift to the children, is generally to be read without *having had* children.] (*g*) Indeed if the words in question are not held to be simply referable to the objects of the preceding devise (as in Goodright *v.* Dunham and that class of cases), it would seem to be even better to construe them as denoting a failure of issue of *every degree* living at the decease, than the failure of surviving *children*. An example of the former of these two species of construction is afforded by Hutchinson *v.* Stephens, (*h*) where the devise was to trustees in fee upon trust for H. for his life, and after his decease upon trust for the child and children of H. lawfully to be begotten, at his, her or their respective ages of twenty-one years, if more than one as tenants in common; and if there should be but one child living at his *decease then in trust for such only child at twenty-one: *but in case H. should die without leaving any issue of his body living at the time of his decease*, then over. H. had

(*f*) *Ante* p. *459.

(*g*) White *v.* Hill, L. R., 4 Eq. 265; Treharne *v.* Layton, L. R., 10 Q. B. 459, (will dated 1863,) and other cases cited ch. XLIX., *ad fin.*

(*h*) 1 Kee. 240.

two children, both of whom died in his lifetime, one of them leaving children who survived H. Lord Langdale, M. R., held that, in the event which had happened, the children took estates in fee simple as tenants in common. In this case the words, "if there shall be but one child *living at his decease*," appeared to supply a plausible argument for reading the word "issue," subsequently occurring in juxtaposition with the same words, in the sense of *children*, and its rejection serves to show the strong disinclination of the courts to adopt a construction which exposes the vested interest of a child to be divested on decease within a given period, although leaving issue who survive that period: and hence the case tends to confirm the remarks made on Lord Cottenham's construction in Tarbuck *v.* Tarbuck.

Remark on Hutchinson v. Stephens.

[So, in Ex parte Hooper, (*h*) where the devise was to A for life, and after her decease to her children, "(in case she shall *leave* more than one child) their heirs and assigns as tenants in common, but in case she shall *have* only one child then to such one child in fee;" but in case A should "die without *leaving* any issue," then to such children as the testator should *leave or have living at the time of the death of A*. Sir R. Kindersley, V. C., decided first, that under the original devise the property vested in the children on their birth; secondly, that the testator plainly meant failure of issue at the death of A; and thirdly, that, as there was a grandchild then living, the limitation over failed. (*i*)

"Die without leaving issue" held not to refer to issue before mentioned.

But if the original devise is to such children as survive their parent, the construction which reads the words "die without leaving issue" as denoting a failure at that time of issue of every degree might defeat the gift over without benefiting any previous devisee. The simply referential construction, though it would not, any more than that just mentioned, provide for surviving issue of remoter degree than children, would save the gift over. Thus, in Eastwood *v.* Avison, (*k*) where the primary *gift (implied from a power of testamentary ap-

[(*h*) 1 Drew. 264, 21 L. J., Ch. 402.

(*i*) The first was the principal point. The V. C. held "leave," *in the parenthesis*, to mean "have," assisted thereto by finding "have" used in a corresponding portion of a similar devise to a brother of A and his children. He is sometimes cited (L. R., 4 Eq. 269, 270, 7 Eq. 476, 10 Q. B. 462) as having construed "leaving" in *the gift over* as "having;" but, notwithstanding the marginal note in 1 Drew., his opinion on that clause was distinctly contrary, (1 Drew. 268,) and therein agrees with his opinion, 2 Sim. (N. S.) 202, 203, stated *ante* p. *452.

(*k*) L. R., 4 Ex. 141.

pointment) was to children living at the death of their father, the donee, with a gift over on his death "without issue," it was held that this meant without children objects of the previous gift, viz., children living at the death of their father. But for the power (*l*) it seems that the father might have been held entitled to an estate tail by implication from the words "die without issue," such estate tail to take effect in the alternative of there being no children at his death. An implication of this kind (as will presently be seen) is frequently made to supply a gap caused by the exclusiveness of the primary gift.]

Effect where words refer to failure of issue of children, objects of prior devise.

It seems that where the testator not merely devises over the property in the event of the parent dying without issue, but goes on to provide for the contingency of the *issue* also dying without issue, the effect is to cut down the fee simple of the children to an estate tail; (*m*) although, it will be observed, by this construction two different meanings are given to the word "issue" in the same sentence. (*n*) In Ives *v.* Legge (*o*) this construction was given to the phrase "in default thereof," following a devise to the parent for life, with remainder to the children in fee: it was held to refer to both the children and the heirs of the children; and, as the devisee over stood in the relation of uncle to the children (so that there could not be a failure of their heirs while he lived), the word "heirs" was read heirs *of the body*. (*p*)

"In default thereof."

(*l*) As to the restriction thus imposed on the words "die without issue," *vide* ch. XLI., § 3, sub-s. 3.]

(*m*) Doe d. Barnard *v.* Reason, cit. 3 Wils. 244; but as the words were "in default of such issue," the case hardly seems to fall within the present section. The devise was to E. for life, and after her decease to such issue of the body of E. as should be then living, and to the heirs of such issue; and if there should be only such issue one child, then the whole to that one child and its heirs; and if two or more children, then to such two or more and their heirs, as tenants in common; and in case E. should die without issue then living, *or in case all such issue should die without issue*, so that the descendants of her body should be dead without issue, then to B. and F. in fee. It was held that E. took an estate for life only, with remainder to her issue (*qu.* children) in tail, with a vested remainder to B. and F. See also Southby *v.* Stonehouse, 2 Ves. 611; Smith *v.* Horlock, 7 Taunt. 129.

(*n*) But the force of this objection is somewhat weakened by the fact that the word "issue" in this position must be used, in the first instance, in a restricted sense, since the failure of such first-mentioned issue is treated as an event distinct from the failure of the issue subsequently mentioned, which of course would be involved therein if the word "issue" denoted issue indefinitely.

(*o*) 3 T. R. 488, n.

(*p*) *Ante* p. *329.

It may be observed, that whatever tends to narrow the range of objects comprised in the express devise to issue of a certain class or denomination tends in the same degree to weaken the ground for construing subsequent words importing a failure of *issue to refer exclusively to those objects. Thus, the circumstance of the prior gift to children being restricted to such as should attain a particular age was considered to exert this kind of influence upon the construction in Doe d. Rew *v.* Lucraft, (*q*) where a testator devised certain hereditaments to A and B and their heirs, in trust nevertheless as to one undivided moiety for N., his heirs and assigns forever; and as to the other moiety in trust for such *son* of the testator by his then wife *as should first attain the age of twenty-one years*, as and when such son should attain such age, and for his heirs and assigns forever; but in case the testator should depart this life without leaving a son, or, leaving such, none should live to attain the age of twenty-one years, then, as to the last-mentioned moiety, in trust for the testator's *daughter J., if she should live to attain the said age of twenty-one years*, and for her heirs and assigns forever; but, in case J. should depart this life under that age, then unto A and B and their heirs, in trust for such *other his* (testator's) *daughter* by his then wife *as should first live to attain the age of twenty-one years*, and for her heirs and assigns forever; *but should he* (testator) *depart this life without leaving issue*, then he gave the entirety of the said hereditaments unto A and B and their heirs, in trust for N. in fee. The testator died leaving issue his daughter J., who died at the age of four years. The point of construction related to the words in italics, as affecting the devise over. Tindal, C. J., said, "The natural meaning of the words is, either a general failure of issue, in which case the devise over would be too remote, and, consequently, would be void; or they may be taken to contemplate the case of the testator dying leaving no child or children, in which case the event upon which the devise over was to depend never happened; for the testator left a daughter living at the time of his death. But it is contended that these words will also admit of a third interpretation; thus, 'should I depart this life without leaving *such* issue *as before mentioned*;' that is, not only without leaving a son or a daughter, but accompanied by the restriction before recited in the will,

Argument for referential construction weakened by whatever restricts the range of objects.

Doe *v.* Lucraft.

Words held not to be referable to issue before mentioned, being issue who should attain a certain age.

(*q*) 1 M. & Sc. 573, 8 Bing. 386. [See also Alexander *v.* Alexander, 16 C. B. 59.

viz., a son or a daughter who shall live to attain the age of twenty-one years. Cases have been cited to show that the word 'issue' may be construed to mean such issue as the testator had before referred to; but no case can be found wherein the principle has been carried further. It has never been held that *the term may also include any restrictions which may have accompanied it in any former part of the will. Admitting that we may read the clause thus—'without leaving a son or daughter'—what authority have we to insert a restriction—'who shall live to attain the age of twenty-one years?' We clearly are not at liberty to insert any such restriction. It seems to me that if we were to import the latter words into this part of the will, we should be doing violence to other parts of it, or in fact making a new will altogether. The earlier part of the will contains a different disposition from that in dispute. It is material to observe that when the testator is disposing of the moiety in question to his son, and afterwards to his daughter, he does insert the words of restriction, and that he has omitted them in the devise over to the defendant. When, therefore, we see that in one part of his will the testator has used expressions restraining the meaning of the word issue, and that in another part he has not used them, it seems to me that we should not be warranted in concluding that such omission was not intentional."

Words held not referable to "children (prior devisees) who should survive" the ancestor.

[So in Doe d. Bills *v.* Hopkinson, (*r*) where a testatrix devised land to A and B for their lives in equal shares, and after their death she gave the moiety of A to such child or children *as he should happen to leave lawful issue at the time of his death*, as tenants in common in fee; and gave the share of B. "to such child or children *as he should happen to leave living lawful issue at the time of his death*, as tenants in common in fee; but if either A or B should die *without lawful issue* the testatrix gave his moiety to the other and to C for their lives, with remainder to their lawful issue in equal moieties in fee; and if both A and B should die and neither of them should leave any lawful issue, then she gave the whole to C for life, remainder to such children, &c.; and if A, B and C should all die without lawful issue, or if any of them should leave lawful issue and such issue should die under twenty-one and without issue, then over. The question was whether the remainder to the children of A was contingent until his death, or vested on the birth of one, with a liability to open and let in any after-born

(*r*) 5 Q. B. 223.

child. It was contended that the former was the true construction, and that the words "without lawful issue" in the gift over meant without such issue as before mentioned, namely, children living at the death of A. But the court said that, according to this, A might *have issue (children) who should die in his lifetime leaving issue, and yet the estate might go over to B and such issue would be barred: so of the issue of B and C. To avoid these inconsistencies the court, apparently not seeing any other way of escape, (s) held that the remainder was vested. Rejecting wholly the referential construction of the words, it would seem that the court acquiesced in the contention that the only alternative was to read them as importing an indefinite failure, which, unless an estate tail was implied in A, would of course have been void for remoteness. But nothing was decided except that the remainder to the children was vested, a decision which is scarcely reconcilable with the authorities relating to the vesting of estates. (t)

In Doe v. Lucraft the court did not refuse to construe "issue" (in the gift over) as *children*, but only to construe it as "children of the restricted class before mentioned." (u) In Doe v. Hopkinson the court did both. But in Sanders v. Ashford, (x) where a testator devised lands to A for life, remainder to his first son who should attain twenty-one in fee, and in case A should have no son to attain that age, then to the daughters of A as tenants in common in fee; but "in the event of A dying without having any issue male who should attain the age aforesaid, or any issue female, then over;" it was held by Sir J. Romilly, M. R., that the gift over on failure of issue meant on failure of such issue male and female as mentioned in the prior devise; for the repetition of the restrictive words showed that this was the issue he had present to his mind.]

"Die without issue to attain twenty-one," referred to prior gift to "first son who should attain twenty-one."

Again in Franks v. Price (y) where there being in a will (among numerous limitations) a devise *in certain contingent events* of the respective moieties to A and B for life, with remainder to their respective first and other sons in tail male, which were followed by a devise over in case A and B should both die without leaving issue male, or such issue male should die without leaving issue male; it was held after

"Die without leaving issue male" not confined to sons being prior contingent devisees.

(s) But see end of this section.

(t) See vol. I., p. *818.

(u) See per Parker, V. C., Bryan v. Mansion, 5 De G. & S. 737.

(x) 28 Beav. 609.]

(y) 6 Scott 710, 5 Bing. N. C. 37, 3 Beav. 182.

much argument that, as the preceding devises did not carry the property to the issue male of A and B in every possible event, the words introducing the devise over had the effect of creating an implied estate tail in remainder expectant on the estates conferred by those devises. (z)

Principle on which preceding are reconcilable with subsequent cases.

*By keeping steadily in view the principle above suggested, namely, that the argument in favor of applying to the objects of a prior express devise words denoting a failure of issue, gains or loses force in proportion as such prior devise is more or less comprehensive in its range of objects, we shall be able to reconcile the preceding cases, (in which a clause of this nature, following a devise to the whole line of children or sons, has been held to refer to the objects of such prior devise,) with those that remain to be stated, in which similar words preceded by a devise to one or more son or sons only, have been decided not to be simply referential, but to import a general failure of issue, and, therefore, in the case of real estate, to confer an estate tail on the parent; such implied estate tail being (as we shall presently see) either an estate in possession, or in remainder expectant on the determination of the estates comprised in the prior express devise.

Devise extending to *six* sons only.

Thus, in Langley *v.* Baldwin, (a) where a testator devised certain lands to A for life, with power to jointure, and after his death to the first son of A in tail, *and so on to the sixth son only;* and then devised that if A *should die without issue male* the lands should remain to B. It was held that A took an estate tail in remainder expectant on the estates comprised in the prior devises, there being no limitation beyond the *sixth* son, and there might be a seventh, who was not intended to be excluded; therefore, to let in the seventh and subsequent sons, these words created an estate tail.

So, in Att.-Gen. *v.* Sutton, (b) where the testator devised to his

(z) It is observable that, A having died without issue male, B was held to be tenant in tail of the entirety; so that it should seem that Lord Langdale considered that the words in the text distinguished by italics had the effect of giving to A and B either successive estates tail male by implication in the entirety, (as in Tenny *v.* Agar and Romilly *v.* James, *ante* vol. I., pp. *557, *558,) or, as seems more probable, estates in tail male in the respective moieties, with cross remainders in tail male. He did not advert to this point, (which is one of considerable nicety,) conceiving, probably, that B was entitled in either case.

(a) 1 Eq. Cas. Ab. 185, pl. 29, cit. 1 P. W. 759.

(b) 1 P. W. 754, 3 B. P. C. Toml. 75. See also Stanley *v.* Lennard, 1 Ed. 87; Doe d. Bean *v.* Halley, 8 T. R. 5, *post.* Also Evans d. Brook *v.* Astley, 3 Burr.

Devise to *first* and *second* sons.

nephew A for life, and after his decease to the *first* son or issue male of his body lawfully begotten and to the heirs male of the body of such first son, and for default of such issue, to the *second* son or issue male of the body of A lawfully to be begotten and to the heirs male of such second son lawfully to be begotten forever; subject to a proviso that A or his assigns *and the heirs male of his body* should not commit any waste and *should not impeach the payment of the annuities in the said will; and from and immediately after the death of A *without issue male of his body*, or after the death of such issue male, then over. A suffered a recovery, and died without issue. It was held that he took an estate tail: for, as all the issue male which he might possibly have, viz., his third, fourth, and every other son, were not expressly provided for by the will, the limitation after his death "without issue male" raised the same estate in him by implication as if the devise had been in terms to him and his issue male.

Remark on Langley v. Baldwin and Att.-Gen. v. Sutton.

In these two cases, though the express devise embraced only a certain number of his sons, yet it was considered to be evident that the testator did not intend to exclude the others, which, indeed, in Att.-Gen. *v.* Sutton, was clearly manifested by the reference in the proviso to *A and the heirs male of his body;* and the only mode in which this could be effected was to give the parent an estate tail.

On the same principle, where there is a devise to the parent for life, with remainder to *an eldest son only* [for life or] in tail male, a limitation over, in case the parent die *without issue*, will raise in him an estate tail, and not merely refer to the single object of the preceding devise.

Devise to an eldest son only of A in tail, and in default of issue of A, over.

Thus in Stanley *v.* Lennard, (c) where lands were devised to trustees in fee, upon trust to permit A, the eldest of the testator's two natural children, to receive the rents for his life; and after his decease, to permit *the eldest son* of A, and the issue male of *such eldest son* to receive the same; and *for want of issue of the said* A, to permit testator's second son, &c.; and he directed that his son A should have the use of his (testator's) pictures for his (A's) life, and after his decease to his issue, and the issue of his issue; *and for default of issue of* A *then* to T., &c.; A

1570; [Monypenny *v.* Dering, 2 D., M. & G. 171, 172.]

(c) 1 Ed. 87.

died, leaving one child (a daughter), who claimed an estate tail under the will. Lord Northington stated the general rule to be, that where the testator makes a man tenant for life, with remainder to one, two, three, &c., of the issue of the tenant for life, and then, for want of issue of the tenant for life, limits the estate over, this will be an estate tail in the first taker for life by necessary implication; and this, because of the word "then" before the limitation over, which, though sometimes an adverb of time, is sometimes a word of relation, and signifies as much *as "in such case," and must have this effect, that upon the first, second, third, &c., limitations failing, the remainder-man could not take it, because of the words "for want of issue;" and therefore, unless the tenant for life was construed to have an estate tail, it would descend in the meantime to the heir-at-law, because the contingency on which the remainder-man was to take had not happened. Then, as to the will before the court, how could he say that he must not give an estate to A? The words said so: the clause relating to the pictures confirmed it. It was argued that all the sons of A should take an estate in tail male, and then the words would stop; but that he could not do.

Remark on Stanley v. Lennard.

In this case, it will be perceived the words on which the question arose referred to issue of either sex, and not, as in the two preceding cases, to issue of the same species as the individuals to whom express estates were devised, namely, issue male. The construction adopted by the court seems to have been somewhat aided by the gift of the pictures.

Devise to an eldest surviving son only of A for life, and in default of issue of A, over.

[Again, in Key v. Key (*d*) the testator devised an "estate at A" (*e*) to S. K. for life, and after his decease to his eldest surviving son; but in default of issue male, then to his brother T. K. and his eldest surviving son on the same conditions; but in default of issue male, then to the testator's heirs-at-law. It was held, first, that the words "default of issue male" referred to issue male of S. K., and not of his eldest surviving son; (*f*) secondly, that those words were not to be read as meaning default of an eldest surviving son who would take under the prior

[(*d*) 4 D., M. & G. 73. See also Jenkins v. Hughes, 8 H. L. Cas. 593; Andrew v. Andrew, 1 Ch. D. 410; Madden v. Ikin, 2 Dr. & Sm. 213 (personalty); and cf. Ellicombe v. Gompertz, 3 My. & C. 127 (where the referential construction was held to be required by the context.)

(*e*) This was held not to pass the fee: see *post* p. *476.

(*f*) See acc. Wight v. Leigh, 15 Ves. 564, *post* p. *474.

limitation, but in default of issue male generally of S. K., and that S. K. therefore took an estate tail male.] (*g*)

It is observable, [with respect to both the cases last cited,] that in the events which had happened, it was not necessary to decide whether the parent took an estate tail in the first instance, or (which seems a better construction) an estate tail in remainder expectant on the estate tail or estate for life of the son. A point of this nature, however, arose in the next case, Doe d. Bean *v.* Halley, (*h*) which deserves particular attention. *The testator devised to his nephew A and his assigns for his life without impeachment of waste, and after his decease to the *eldest son* of his said nephew A lawfully to be begotten and the heirs of such eldest son, upon condition that such eldest son were christened and called by the name of F.; *and in default of issue male of* A, then over to his (the testator's) nephew B and his son in like manner. (*i*) It was held that the evident intention being that B and his issue should not become entitled until the male issue of A should have become extinct, A took an estate tail by implication, and then the limitations were to be read to A for life, remainder to the eldest son in tail male (not in fee simple, as had been contended), with remainder to A in tail male, with remainder over. Lawrence, J., referred to Att.-Gen. *v.* Sutton and Langley *v.* Baldwin as warranting this construction. (*k*)

Remark on Stanley *v.* Lennard and Key *v.* Key.

Doe *v.* Halley.

Remainder in tail implied in the parent, expectant on estate tail of eldest son.

Even where the prior devise runs through the whole class of sons

(*g*) The eldest surviving son of S. K. left only a daughter.]

(*h*) 8 T. R. 5. See also Parr *v.* Swindels, *post* p. *476.

(*i*) A bequest much resembling this occurred in Marsh *v.* Marsh, 1 B. C. C. 294, where a testator bequeathed personalty in trust for W. for life, and after his decease to his eldest son and his heirs forever; and in case of their death without issue, then over to A; and it was held that the two gifts to the son and A were alternative. The word "their" was assumed to mean *his*, and the word "issue" to denote *son*.

(*k*) It is to be observed that in Langston *v.* Pole, 2 M. & P. 490, where the devise was nearly the converse of that in the two cases in the text, (the testator having passed by the first son of the devisee for life, and then proceeded to devise the property to his second and other sons in tail,) the first son was held to take an estate tail by force of the intention collected from the subsequent part of the will, which reserved to the devisee for life a power of appointing portions to his daughters *in case of there being no son*, (combined with another event,) and also limited portions to the *testator's own* daughters in similar terms; but as the first son was considered upon the whole will to be tenant in tail by implication, the case has been stated in a former chapter as exemplifying this doctrine, vol. I., p. *491.

or children in succession, yet, if they take life estates only, there seems less disposition to hold subsequent words importing failure of issue to refer exclusively to the objects of such devise, than where (as in the preceding cases) the prior devise confers estates of inheritance; and accordingly we find in several instances of this nature the words in question have been held to create an estate tail in the prior devisee.

Rule where preceding gifts to sons or children are for life only.

Thus, in Wight *v.* Leigh, (*l*) where A devised all her real estates in Surrey to her husband B, in case he survived her, during his life; and after B's decease she gave the said Surrey estates to C, and after his death to his first and other sons; *and in default of male issue*, then she gave the said estates unto the eldest and other daughters of C and to their heirs male forever, on condition that they should take the name of W. and *no other. C (who had a son and three daughters) claimed an immediate estate tail; against which, however, it was contended that by giving the father an estate tail the court would expunge the limitation to the first and other sons, which was a *descriptio personæ* as much as a limitation to an existing son by name, *pointing* also to that order in which estates are usually limited with a view to succession according to priority of birth: and that the words "in default of issue male" might be applied, not to C, but to the immediate antecedent, the first and other sons; a construction more grammatical, more consistent with the general plan of the devise, and approaching as near as could be to the ordinary language and course of settlement; but Sir W. Grant, M. R., decided that C took an immediate estate tail. He said that the evident intention of the testatrix was to prefer all the male issue of *somebody*, either of the plaintiff, or of his first and other sons, to the daughters; but she had not given such an interest to any one as would enable male issue generally to take, for all that was given to the plaintiff was what amounted in law to an estate for life, and *so it was with regard to the estates given to his first and other sons.* It was necessary, therefore, in order to effectuate the general intention in favor of issue male, to consider some of the antecedent takers as having by implication such an estate as would enable all the issue male to take, which could only be by giving an estate tail either to the father or to his first and other sons. The male

To A for life, remainder to first and other sons for life, and in default of issue male, over; immediate estate tail raised by implication.

(*l*) 15 Ves. 564. [See also per Lord Kingsdown, Towns *v.* Wentworth, 11 Moo. P. C. C. 546.

issue intended must, his Honor thought, be the male issue of the father, not of the sons. Nothing was before mentioned of any issue male of the sons, whereas there was a certain description of male issue of the father before spoken of, viz., his first and other sons. (*m*)

Observations upon Wight *v.* Leigh.

In this case the word "estate" was sufficient *per se* to vest the fee in the sons; which circumstance however escaped attention, though it would undoubtedly have influenced the construction: for if it had been perceived that the sons under the prior expressions would, but for the intention of succession, have taken the fee simple, the words "in default of male issue" would in all probability have been applied *to them*, in order to cut down that fee to an estate tail, which was necessary to give effect to the intention that the sons should take successively; that being established to be the mode of construing such a devise. (*n*) It will be observed that the fact of the sons taking *only an estate for life under the devise was much relied on, both at the bar and on the bench, in support of the construction adopted. [It has since, however, been regarded as a conclusive argument against holding the fee simple to pass by the word "estate" so placed that, in the probable event of the limitation to the first son vesting in him, all the subsequent limitations would be annihilated, and the intention of succession defeated.] (*o*)

But although the devise to the sons was (as assumed by Sir W. Grant) capable of conferring estates for life only, there was no apparent reason why such devise should be sacrificed, in order that the parent might take an estate tail. What prevented the following construction of the limitations? To the parent for life, with remainder to the first and other sons for life, *with remainder* to the parent in tail. For such a construction Doe *v.* Halley would even then have afforded ample authority, but the attention of the M. R. does not appear to have been called to this case, or indeed to the suggested mode of construing the will, which, however, is now exemplified in two more recent cases.

To A for life, remainder to her children; if A die without leaving issue, over,

One of these is Parr *v.* Swindels, (*p*) where a testator devised certain messuages to his daughter Mary Parr for life, and after her decease unto and equally between the children of his said daughter, to take as tenants in com-

(*m*) See Key *v.* Key, 4 D., M. & G. 73, *ante* p. *473.]

(*n*) Lewis d. Ormond *v.* Waters, 6 East 336, *ante* p. *456.

[(*o*) Key *v.* Key, 4 D., M. & G. 81, 82. See also Martin *v.* McCausland, 4 Ir. Law Rep. 340; In re Arnold's Estate, 33 Beav. 163 ("my moiety.")]

(*p*) 4 Russ. 283.

mon; *and in case she should die without leaving any lawful issue*, then the testator devised the premises among the children of his daughters Charlotte and Hannah. Sir J. Leach, M. R.: "The plain intention of the testator was that this property should not go over until the failure of the issue of Mary Parr; and to effectuate this intention an estate tail in her must be implied. It is to be considered whether that estate is to be immediate in her, or in remainder after estates for life to her children. If the intention that the property should not go over to the children of Charlotte and Hannah until there was a failure of issue of Mary could not be effectuated without giving an immediate estate tail to Mary, there is in the books sufficient authority to warrant that construction. But as that purpose will, in this case, be equally accomplished by an estate tail in remainder to Mary, after the life estates given to the children, I am of opinion that the better construction is, that Mary takes an interest for life, with remainder to her children as tenants in common for *life, remainder to Mary in tail. This construction will give effect to all the words of the will." (q)

held estate tail in remainder in A.

But this construction, however strongly recommended by its convenience as letting in the whole line of issue, by giving an estate tail to the parent, without sacrificing the preceding express gift to sons, daughters, or children, did not prevail in Bennett v. Lowe, (r) where a testatrix devised certain freehold messuages to A and his heirs, in trust to pay certain life annuities, and after the decease of the annuitants, upon trust to pay the rents to four females for their separate use; and, in case any of the said four persons should happen to depart this life leaving a daughter or daughters, it was declared that the share or interest of her or them so dying should go to such daughters as they should be in seniority of age and priority of birth: Provided always, *that in case any of them should happen to depart this life without issue in the lifetime of the annuitants*, then the testator ordered that the share or interest of her or them so dying be paid, applied and disposed of to certain other persons in succession, as they the said devisees (naming them) should depart this life. On a case from chancery, the questions for the opinion of the court were, first, what estates the four female devisees took; and, secondly, what estates passed to their daughters. It was contended that the word "issue," occurring in the devise over, meant the issue before referred to, namely, the daughters, and might

Referential construction adopted, though daughters in prior devise took life estate only.

(q) 8 T. R. 10.

(r) 5 M. & Pay. 485, 7 Bing. 535.

be read as if the word *such* had been introduced; and that to hold the words to refer to an indefinite failure of issue would defeat the testatrix's intention, which evidently was, that female issue should be preferred to male issue, and that they should take in succession—objects which were quite incompatible with giving the first four takers an estate tail, as then the male issue would take in preference to the females, and the latter would take (if at all) concurrently. It was observed that the limitation over was not to take effect on a dying without issue generally, but only in a particular event, *i. e.*, on the death of any of the females without daughters in the lifetime of the annuitants. The court certified an opinion, that the four devisees took estates for life only, and that their daughters took estates for life on the decease of their parents respectively. The four devisees survived the annuitants; and it was held, that, subject to the estates for life, the fee passed by the residuary clause.

Remarks on Bennett v. Lowe.

*The precise grounds on which the court arrived at this conclusion do not distinctly appear; but we may infer from the tenor of the arguments at the bar and the few remarks which fell from the bench, that it was thought that the issue referred to in the clause in italics were the daughters who were the objects of the preceding devise. Parr *v.* Swindels was not cited, and probably was then not in print. Had any construction supported by authority been suggested, by which the words in question might have received their ordinary and established signification, without interfering with the intention to prefer the daughters and give them estates in succession, the court would, in all probability, gladly have adopted it. One peculiarity in this case deserves notice, namely, that the devise over was, on the failure of the issue within a definite time, namely, the death of the annuitants; but this was very faintly adverted to, and would, it should seem, have no other effect upon the construction than to render the devise over contingent on the failure of the issue of the prior devisee (*i. e.*, the determination of the estate tail) within the prescribed period; it would not, it is conceived, prevent such prior devisee from taking an estate tail. (*s*)

The other of the two cases before alluded to is Doe d. Gallini *v.* Gallini, (*t*) which was as follows:—A testator devised certain lands of which he was seized in fee to trustees and their heirs, upon trust, as to

[(*s*) But see ch. XLI., § 2; *ante* p. *329, n. (*h*); and vol. I., p. *555.]

(*t*) 5 B. & Ad. 621, 3 Ad. & Ell. 340.

part, to permit his son A to receive the profits for life, and as to other parts, to permit his two daughters and his son B to receive the profits for life, and also upon trust, during the lives of his said children, to preserve contingent remainders; and after the decease of any or either of his said children he devised the estate to him or them limited for life as aforesaid, unto all and every his, her or their child or children *living at the time of his, her or their decease*, or born in due time afterwards, for their lives as tenants in common; but, nevertheless, with an equal benefit of survivorship among the rest of the said children, if more than one and if any of them should die without leaving issue, the child or children of each of his said sons and daughters taking the rents and profits of his, her or their parent's estate only; and from and after the decease of all the children of each (*u*) of his said sons and daughters *without* (*x*) *issue*, the testator devised the estates to them re*spectively limited as aforesaid *unto and among all and every the lawful issue of such child or children* (during their lives) as tenants in common, and to descend in like manner to the issue of his said sons and daughters respectively, so long as there should be any stock or offspring remaining; *and for default or in failure of issue of any of his said sons and daughters*, the testator devised the estates so limited to him, her or them dying without issue, unto the survivors of his said sons and daughters during their respective lives, in equal shares as tenants in common; and after their respective deaths, he devised the same to the children of the survivors of his said sons and daughters during their respective lives as tenants in common, with such benefit of survivorship as aforesaid, and, after the decease of all of them, to the issue of such children, in like manner as he had before devised the original estate of each of his said sons and daughters; *and for default or in failure of issue of all his said sons and daughters*, except one, the testator devised all his said estates unto his only surviving son or daughter in fee. It was contended that the testator's children took immediate estates tail by force of the words showing that the property was not to go over to the surviving children until a total failure of issue of any deceased child or children; and to this general intention any particular inconsistent intention ought to bend. The construction decided upon by

Remainder in tail implied in the parent expectant on estate expressly devised to the issue.

(*u*) "Each" was apparently inserted by mistake for "any" or "either," *ante* vol. I., p. *504.

(*x*) The word "without" was evidently written by mistake for "leaving."

the court, after much consideration, was that the testator's children took estates for life, with remainder to their respective children in tail, with cross-remainders in tail between the grandchildren, *with remainder in tail to the parent* (*i. e.*, the testator's children.) Lord Denman, C. J., after some prefatory remarks, said,—"The argument founded upon the whole will is, that the testator means the estate left to each of his sons and daughters to go to the whole line of issue of those sons and daughters respectively, and only on failure of the whole line of issue to go over, and this on account of the use of the term 'issue' of the sons and daughters, which word 'issue' is here to be construed (as it generally is) a word of limitation, and equivalent to the term 'heirs of the body,' and as embracing the whole line of lineal descendants; and therefore it is contended that each son and daughter took an estate tail in the portion left to him. *But if the term 'issue' is here a word of limitation, why is it not equally so in the part in which the estate is given over to the surviving children of the sons and daughters, if any of them shall die without leaving issue?* *From which it is clear, that the testator does not mean the survivors to take till failure of all the issue of the deceased children. If the term 'issue' has here the same meaning, then the children living at the time of the death of the sons and daughters respectively must take estates tail as tenants in common in their respective shares, with cross-remainders either for life or in tail (which it is unnecessary to decide), with remainder to the sons and daughters in tail in their respective shares, and remainders over; and this construction makes the least sacrifice of the testator's declared intention; it preserves estates to all his grandchildren living at the death of his sons and daughters as tenants in common, which, it is clear, the testator intended to give; *and it also includes the descendants of a grandchild dying in the son's or daughter's lifetime,* (y) though the estate to them is postponed to that of the children; and it includes all the issue of each son and daughter before the estate goes over. The estate tail in the sons and daughters takes effect not in derogation of, but by way of remainder on, the express estates given to the children of the sons and daughters, in which respect it resembles the case of Doe d. Bean *v.* Halley (z) It is true that these grand-

Lord Denman's judgment in Doe v. Gallini.

Implication of remainder in tail.

[(y) To include these descendants may be considered to have been the principal object of giving the parents an estate tail in remainder, and distinguishes this case from Blackborn *v.* Edgley, 1 P. W. 605, *ante* p. *461.]

(z) 8 T. R. 5.

children cannot take estates for life as the testator intended, for the rule in Shelley's Case prevents it; (a) nor the children of those children estates for life as tenants in common, for the rule of law against perpetuities prevents that; but this is unavoidable, and no construction can carry into effect all the testator wished."

A writ of error was brought in the Exchequer Chamber, and the decision of the Court of K. B. was there unanimously affirmed. The reasoning of Tindal, C. J., (who delivered the affirming judgment) bears a close resemblance to that of Lord Denman in the court below. After reading the concluding passage in the will above stated, the C. J. said,—"The words, undoubtedly, if they had occurred without any intervening devise to the grandchildren, would have been sufficient to create immediate estates tail. But there has been in the foregoing part of the will not only an express devise to the grandchildren for life, but also words sufficient to enlarge such estates for life *in the grandchildren into estates tail. Admitting, therefore, the argument of the plaintiff's counsel to be just, that, if we give to the words 'failure of issue,' when applied to the grandchildren surviving, the force of enlarging their estates for life into an estate tail, we ought to give the same effect to the same words at the end of the devise, when applied to the children of the testator, and, consequently, their estates for life must be similarly enlarged; still the question arises, whether such estate tail in the sons and daughters of the testator is immediate, or whether it is not to be postponed until after the estate tail in the children of such sons and daughters has taken effect? If we consider the clause of the will last referred to as giving an immediate estate tail to the children, the previous devise to the grandchildren as tenants in common in tail is defeated: whereas, if we hold the devise to the children of the testator to be an estate in tail, but to be a devise in remainder only, in that case the limitation for life to the children will take effect, and the devise to the grandchildren as tenants in common in tail, in remainder; and the general remainder over, to the children of the testator in tail, will also take effect, and will effectually secure the descent of the property in the line of the testator's family, as long (to use the testator's own expression in his will) as 'there shall be any stock or offspring of the testator remaining.'"

Judgment of Tindal, C. J., in Gallini v. Doe.

(a) *I. e.*, the grandchildren could not take a life estate only, consistently with the intention that the estate should devolve to the issue or heirs of the body of such grandchildren.

Remarks on Doe v. Gallini.

These cases would seem to lay down the sound and reasonable rule, that where an estate is devised to a person for life, with remainder to his children, or to his sons or daughters, with a devise over on the failure of the issue of the devisee for life, and the latter words are held to create an estate tail in the parent (but which they will do only under a will which is subject to the old law), (*b*) the devise to the children, sons or daughters, is not unnecessarily and wantonly sacrificed to this object; but the parent, *i. e.*, the devisee for life, takes an estate tail in remainder, expectant on the determination of the prior estates of his children, sons or daughters (as the case may be.) And there seems to be no reason why this construction should not prevail as well where the prior devise to the children's sons or daughters confers estates tail in remainder, expectant on the parent's life estate, as where those devisees take estates for life, unless Bamfield *v.* Popham, Blackborn *v.* Edgley [and Baker *v.* Tucker] should be considered conclusive against such a construction. Indeed, in *Doe *v.* Gallini the children of the testator's sons and daughters were held to take estates tail in the first instance, with remainder in tail to the sons and daughters; as, notwithstanding the apparent restriction of the estates of such issue to life estates, they were held to take estates tail by force of the word "issue," as a word of limitation, strongly aided by the context.

Remark upon Doe v. Hopkinson.

[These cases show that in Doe *v.* Hopkinson (*b*) the court might have escaped the inconsistencies to which they adverted, without doing violence to the express words of contingency contained in the gift to the children, by reading the limitation thus: to the ancestor for life, with contingent remainder in fee to his children living at his death, with alternative contingent remainder to the ancestor in tail, with remainder over.

Implication of *executory devise* in tail.

In Andrew *v.* Andrew, (*c*) where the devise was to T. for life, remainder in fee to his eldest son when he attained twenty-one, and "in default of A having a son," over; an estate tail in the parent was implied from the gift over, to take effect *by way of executory devise* if the eldest son (whose estate was held to be vested) should die under age.]

III.—3. An examination of the preceding cases will suffice to show

[(*b*) But see ch. XLI., *ad fin.*
(*b*) 5 Q. B. 223, *ante* p. *469.
(*c*) 1 Ch. D. 410, *ante* vol. I., p. *815.]

how numerous, and, in some instances, how refined, are the distinctions upon which the construction of words importing a failure of issue depends. They cannot, it is conceived, but suggest the wish, that these words had been more strictly confined to the office of merely connecting the two limitations between which they are interposed: and that whenever the preceding devise embraced *any* class of issue, they had been considered as referential to those objects, which is the established rule in regard to the expression *such* issue. The application of this rule to the cases under consideration would have required only the implication of the word "such." Though, in the state of the authorities, it may seem dangerous to advance any general conclusions upon the subject, the writer ventures to submit the following propositions, as deducible from the cases; in framing which, to avoid the risk of misleading the reader, he has cautiously adhered to the circumstances of the several cases, without extending his propositions to others apparently within the scope of the principle.

General remarks on preceding cases.

1st. That the words, *in default of issue*, or expressions of a similar import, following a devise to *children in fee simple*, mean *in default of *children* [and following a devise to children in tail, mean in default of children or of issue inheritable under the entail.] (*d*) This is free from all doubt.

Conclusions suggested.

2nd. That these words following a devise to *all* the sons successively in tail male, and daughters concurrently [or successively] in tail general, [or in tail special] are also to be construed as signifying *such issue*, even in the case of an executory trust. (*e*)

3rd. That words devising over the property on failure of issue *male*, following a devise to the whole line of sons successively in tail male, are also referential to those objects. (*f*)

[4th. That where the children take a life estate only the words "in default of issue" introducing the gift over will create an estate tail by implication in the parent subject to the children's life estates.] (*g*)

(*d*) Goodright *v.* Dunham, Doug. 764, *ante* p. *459; [Doe *v.* Duesbury, 8 M. & Wels. 514, *ante* p. *464;] Ginger d. White *v.* White, Willes 348; [Baker *v.* Tucker, 3 H. L. Cas. 106, 14 Jur. 771, *ante* p. *460.]

(*e*) Blackborn *v.* Edgley, 1 P. W. 600, *ante* p. *461; Morse *v.* Marquess of Ormonde, 5 Mad. 99, 1 Russ. 382, *ante* p. *463; [Peyton *v.* Lambert, 8 Ir. Com. Law Rep. 485.]

(*f*) Bamfield *v.* Popham, 1 P. W. 54, 760, 1 Eq. Cas. Ab. 183, 2 Vern. 427, 449.

[(*g*) Doe *v.* Gallini, 3 Ad. & Ell. 340, *ante* p. *478; Parr *v.* Swindels, 4 Russ. 283, *ante* p. *476; and per Lord Kingsdown, Towns *v.* Wentworth, 11 Moo. P. C. C. 546.]

5th. That where there is a prior devise to a *definite number of sons only* in tail male, with a limitation over in case of default of issue or issue male of the parent, an estate tail will also be implied in the parent, in order to give a chance of succession to the other sons. (*h*)

6th. That in the case of executory trusts, words importing *a dying without issue,* following a devise to the first and other sons of a particular marriage in tail male, authorize the insertion of a limitation to the parent in tail general, in remainder expectant on those estates. (*i*)

7th. That such words (whether they refer to issue or issue male), succeeding a devise to the eldest son [for life or] in tail, are not referable to such son exclusively, but create in the parent an implied estate tail, (*k*) in remainder expectant on the estate [for life or in] tail of the son; (*l*) and which rule also, it seems, applies where children [only who survive a specified period] take estates tail. (*m*)

*8th. That the circumstance of the preceding devise to children, &c., being subject to a contingency (*o*) is rather unfavorable to the construction which reads words importing a failure of issue to refer to a failure of the objects of such preceding devise.

This statement of the result of the cases may somewhat assist in the consideration of the subject, though cases are incessantly occurring which present new circumstances, and give rise to nice questions on the application of the rules furnished by the preceding authorities, even admitting those rules to be free from doubt. The reader is recommended, before he unreservedly accedes to the foregoing propositions, to consult the cases themselves, in order that he may see how far the construction may have been aided by the circumstances of the particular case. (*p*)

III.—4. It may be useful, in this place, to advert to the doctrine

(*h*) Langley *v.* Baldwin, 1 P. W. 759, 1 Eq. Cas. Ab. 185, pl. 29, 1 Ves. 26; Att.-Gen. *v.* Sutton, 1 P. W. 754, 3 B. P. C. Toml. 75, *ante* p. *471.

(*i*) Allanson *v.* Clitherow, 1 Ves. 24.

(*k*) Stanley *v.* Lennard, 1 Ed. 87; [Key *v.* Key, 4 D., M. & G. 73,] *ante* pp. *472, *473.

(*l*) Doe d. Bean *v.* Halley, 8 T. R. 5, *ante* p. *473.

(*m*) Doe *v.* Gallini, 5 B. & Ad. 621, 3 Ad. & Ell. 340, *ante* p. *478.

(*o*) Doe *v.* Lucraft, 8 Bing. 386, 1 M. & Sc. 573; Franks *v.* Price, 6 Scott 710, 5 Bing. N. C. 37, 3 Beav. 182; [Alexander *v.* Alexander, 16 C. B. 59; Doe *v.* Gallini, *supra* n. (*m*); and per Lord Cranworth, 8 H. L. Cas. 593.

(*p*) See especially per Turner, L. J., Key *v.* Key, 4 D., M. & G. 88.]

of *general* and *particular intention*, (q) or, to speak more explicitly, that supposed rule of construction by which the particular intent expressed in a will is sacrificed to the general and paramount intention that the estate shall not go over to the next devisee until the issue of the preceding devisee shall have become extinct, and which has been considered to authorize the giving to such prior devisee an estate tail. The doctrine occupies so conspicuous a place in the will-cases of one period, that it must not be dismissed without a few remarks.

Doctrine of general and particular intention.

The phrase "general intention," in the above sense, was first adopted in Robinson *v.* Robinson, (r) where, we have seen, the Court of K. B. held the devisee to take an estate tail male; and their reason for this construction was expressed to be, not that "son" was here a word of limitation (which has been shown to be, and which Sir Dudley Ryder, (s) before whom the case was first argued, treated as the ground of the decision), but to "effectuate the manifest general intention of the testator." Expressions of a similar nature fell from Wilmot, C. J., in Roe *v.* Grew, (t) where he is made to refer the determination, that the devisee was tenant in tail, to the "weightier" intention that the estate was not to go over until failure of his male issue, and not to the more *simple and obvious ground of "issue" being a word of limitation in the devise itself, which was the reason distinctly advanced by two of the other judges.

Origin of phrase "general intention."

The next mention of this doctrine is by Lord Kenyon, under whose auspices it seems to have first grown into importance; for in scarcely a single instance did this eminent judge come to the conclusion that a person took an estate tail under a devise to him and his issue, or to him and the heirs of the body, (u) without adducing as a reason, that the general intention to which the particular intent must give way, required such a construction, generally referring to Robinson *v.* Robinson and Roe *v.* Grew; though he was not always consistent in his mode of treating the former case. (x)

But it will be asked what is the "particular intent" which is thus

(q) See a masterly and extended dissertation on this doctrine in Mr. Hayes' Inquiry, 284 to 365.

(r) *Ante* p. *401.

(s) He died pending the cause, and was succeeded by Lord Mansfield in 1756.

(t) *Ante* p. *418.

(u) See Doe d. Blandford *v.* Applin, 4 T. R. 87, *ante* p. *424; Denn d. Webb *v.* Puckey, 5 Id. 303, *ante* p. *420; Doe d. Candler *v.* Smith, 7 Id. 531.

(x) *Ante* p. *402.

Meaning of *particular* intention.

to be sacrificed? In the certificate of the Court of K. B. in Robinson *v.* Robinson no *particular* intent is referred to; but Wilmot, C. J., who first introduced the expression in Roe *v.* Grew, appears to have meant by it simply the estate for life; and so, it would seem from his language, did Lord Kenyon in Doe *v.* Applin (*y*) and Denn *v.* Puckey. (*z*) In this sense, however, it is merely descriptive of the operation of the rule in Shelley's Case; (*a*) for the sole reason why the intention to give an estate for life cannot consist with, but must be sacrificed to, the design of letting in a line of issue, is, that *that* rule will not permit a person to be tenant for life, and his heirs or the heirs of his body (which is the construction of "issue" when used as a word of limitation) to be purchasers in the same will. But if this be all that is meant by the expression "particular intention," for what reason is this ambiguous and not very accurate phraseology employed in referring to the operation of such a well-known and familiar rule of law? And why is Robinson *v.* Robinson to be exclusively cited for the purpose, when any one of the multitude of decisions illustrating the rule would have been equally in point? It is manifest, indeed, from the use which Lord Kenyon made of this case, that he sometimes, at least, included in the phrase "particular intent," an express gift to a particular degree of issue; and this is the more evident from his observations in Doe d. Candler *v.* Smith, (*b*) where, after reading the devise to "heirs of the *body" as a gift to *children*, he sacrificed this intent to the "general intention" that "all the progeny of those children should take before any interest should vest in" the devisees over, and accordingly held the parent to be tenant in tail. (*c*) Now, *if* he were authorized to construe "heirs of the body" as designating *children*, (*d*) on what sound principle, or even plausible pretence, was the express devise to the children to be sacrificed to the intention inferred from the words introducing the devise over? To assign to these words such an operation, is to set up an intention collected merely by inference from phrases of an ambiguous character, against an inten-

Doctrine of general and particular intention.

(*y*) 4 T. R. 87.

(*z*) 5 T. R. 303.

(*a*) As to which, see *ante* ch. XXXVI.

(*b*) 7 T. R. 532, *ante* p. *379.

(*c*) And Grose, J., in Doe *v.* Cooper, 1 East 229, *ante* p. *425, assumed the word "issue" in the devise to mean *children*, and then that it was to give way to the intent, appearing by the words introducing the devise over, to let in all the descendants. Both branches of this hypothesis are equally untenable.

(*d*) But as to which, see *ante* p. *364.

tion clear, express, and unequivocal; and when, too, (which constitutes the great force of the absurdity,) *there is no incompatibility or incongruity in the two limitations.* That an implied estate tail in the parent *in remainder after an estate tail in the children* is perfectly consistent with such an estate in them, and would attain the object of letting in all the descendants of the first taker equally well with an immediate estate tail, is too palpable for serious argument. The one undoubtedly is distinct from, but not in the least repugnant to, the other. It is evident, therefore, that to have struck out one of these limitations would have been an unwarrantable interference with the express language of the testator, not called for by the necessity of the case, and in direct contravention of the rule which requires that effect should be given, if possible, to *every* part of a will. It is satisfactory that Doe d. Candler *v.* Smith may be supported on irrefragable grounds, independently of any such doctrine; for, as it is now established that the words "heirs of the body," in such a context, cannot be read *children*, (*e*) the whole assumption upon which the court proceeded fails, and the case is clearly right upon the uncontrolled operation of "heirs of the body" as words of limitation; but this, while it sustains the authority of *the case* deprives *the doctrine* of all the sanction which that authority would have communicated. Nor is this all: many of the cases antecedently stated afford negative authority against it; for it is observable that in Langley *v.* Baldwin, (*f*) Att.-Gen *v.* Sutton, (*g*) and *Stanley *v.* Lennard, (*h*) where estates tail were raised in the parent by the effect of the words introducing the devise over, not a word is said of sacrificing the devise to the sons to this object. On the contrary, in Att.-Gen. *v.* Sutton those who argued for this construction evidently considered that the ulterior estate of the parent was to take effect as a remainder *expectant on* the estate tail of the sons. In Allanson *v.* Clitherow (*i*) too, (where, however, the trust was executory,) this construction was *expressly* adopted. But the most conclusive authority against the doctrine in question is Doe d. Bean *v.* Halley, (*k*) where even Lord Kenyon, its most strenuous champion, held that the estate tail raised by implication in the parent took effect by way of remainder, after, *and not in derogation of*, the express devise to the eldest son.

(*e*) *Ante* ch. XXXVII.
(*f*) 1 P. W. 759, *ante* p. *471.
(*g*) Id. 754, 3 B. P. C. Toml. 75, *ante* p. *471.
(*h*) 1 Ed. 87, *ante* p. *472.
(*i*) 1 Ves. 24.
(*k*) 8 T. R. 5, *ante* p. *473.

Lord Kenyon's abandonment of the doctrine in Doe v. Halley.

In this case, indeed, his lordship seemed to be on the point of applying in practice the doctrine which he had been so long maintaining in theory; for he said, "We have our choice of two constructions to effectuate the testator's general intent, *either to give an immediate estate tail to A, which would violate the particular intent of the devisor*, or (and to which construction I incline) to say that he took an estate for life, remainder in tail to his eldest son, remainder in tail to the father, in order to let in all his issue male." To have expunged the devise to the eldest son in this case would have been a practical illustration of the doctrine in question; and in refusing to do so he virtually negatived its existence, and thereby established, not the prevalence of the general intent over the particular intent, but the triumph of sound sense and legal principles over one of the absurdest doctrines that was ever advanced. He added, however, "In deciding this case I will not abandon the general rule recognized and acted upon in Robinson *v.* Robinson."

This observation shows, first, that Lord Kenyon suspected that his decision might be considered to encroach upon the doctrine which he had taken such pains to rear upon the authority of this case; and, secondly, that he regarded Robinson *v.* Robinson as a case in which, by holding the parent to be immediate tenant in tail, the devise to the son *as a designated object* was *sacrificed* to the "general intent" appearing by the subsequent words, (*l*) which is the only view in which it can possibly *be considered as coming into collision with Doe *v.* Halley, where the devise to the eldest son was *preserved*. If that case supported any such doctrine (but which the writer trusts he has satisfactorily shown it does not), it is clearly overruled by Doe *v.* Halley; and Lord Kenyon's express reservation can avail but little in preserving the doctrine from the effect of his own decision, rejecting it in the very case for which, if applicable at all, it appeared to have been designed.

So far, therefore, it is clear that the doctrine of *general* and *particular* intention had existed only in name; the cases in which it was professed to be applied being clearly referable to other grounds, and in those which seemed to call for its application the doctrine being rejected. In Wight *v.* Leigh, (*m*) already stated, however, we have an instance nearly the converse of the former class; for, without a distinct recog-

(*l*) See an observation upon this, *ante* p. *456; and see his lordship's own allusion to the case, *ante* p. *402.

(*m*) 15 Ves. 564, *ante* p. *474.

nition of the doctrine, a construction, amounting in effect to an application of it, seems to have been adopted.

The confusion temporarily introduced by this case, however, has been completely dissipated by Parr *v.* Swindels and Doe *v.* Gallini, in both which we have seen it was held, upon the authority of Doe *v.* Halley, that words importing a failure of issue of the devisee for life conferred on him an estate tail, not in derogation of, but in remainder expectant on the estates devised to the children. In Doe *v.* Gallini the doctrine of general and particular intention underwent much discussion, and Lord Denman was pleased to express his concurrence in the views of the writer of these pages. His lordship observed, (*n*) "The doctrine that the general intent must overrule the particular intent has been much, and, we conceive, justly objected to of late, as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results. In its origin it was merely descriptive of the operation of the rule in Shelley's Case, and it has since been laid down in others where technical words of limitation have been used, and other words, showing the intention of the testator that the objects of his bounty should take in a different way from that which the law allows, have been rejected; but in the latter cases, the more correct mode of stating the rule of construction is, that technical words or words of known legal import must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly *clear that the testator did not mean to use the technical words in their proper sense; and so it is said by Lord Redesdale in Jesson *v.* Wright. (*o*) This doctrine of general and particular intent ought to be carried no further than this; and thus explained, it should be applied to this and all other wills."

Lord Denman's remarks on doctrine of general and particular intention.

III.—5. Devises of reversions sometimes give rise to a question which bears a strong analogy to that discussed in the present chapter. This occurs where a testator, having a reversion in fee, subject to estates tail belonging to the sons or other partial issue of a person, (*p*) devises the reversion as property in the

Devises of reversions.

(*n*) 5 B. & Ad. 640.

(*o*) 2 Bli. 57.

(*p*) The writer has avoided suggesting the case of the limitations being to the testator's *own* sons, because such cases may perhaps be considered as falling within another principle, discussed in the next chapter. See Sanford *v.* Irby, 3 B. & Ald. 654, and other cases there discussed.

event of that person dying *without issue*, which necessarily raises the question whether these words refer to the determination of the subsisting estates, or to a general failure of issue, or, in other words, whether they are words of description or donation: in the former case the devise operates as an immediate disposition of the reversion; (q) in the latter it is an executory devise, and, as such, is void for remoteness.

Whether words refer to determination of subsisting estates.

A point of this nature occurred in Lady Lanesborough *v.* Fox, (r) where A, having settled the lands in question on the marriage of his son B, to the use of himself (A) for life, remainder to his son B for ninety-nine years if he so long lived, remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of B *on his intended wife to be begotten* successively in tail male, remainder to the heirs *male* of the body of B, with reversion to the right heirs of himself (A), by his will devised the lands contained in the settlement *on failure of issue of the body of* B, *and for want of heirs male of his* (A's) *body, to his daughter* F *in tail:* and the House of Lords adjudged, in concurrence with the unanimous opinion of the judges, that the will did not give an estate tail by implication to B, and that therefore the devise over to F was executory, and void, as being on too remote a contingency.

If this case had rested solely on the circumstances that the subsisting estate tail in B embraced the heirs *male* only, and the devise in the will referred to his (B's) issue *generally*, (which certainly was argued as the chief point in the case,) the decision, *it is conceived, could hardly have been sustained, consistently with the rules of construction deducible from the cases discussed in the present chapter, in many of which we have seen that words referring in terms to issue or issue male have been held to apply to *children* or *sons*, being the objects of the antecedent limitations. (s) *A fortiori* therefore in the present instance would they have been construed to be referential, where the approximation to a correct reference to the subsisting estates was such as to require only the word "male" to be supplied; and Tuck *v.* Frencham (t) affords an instance (if authority were requisite) of this word being supplied to make words referring to issue gen-

Observations upon Lanesborough v. Fox.

Whether words of contingency refer to subsisting estate tail.

(q) See *ante* vol. I., p. *800.
(r) Cas. temp. Talb. 262.
(s) *Ante* p. *483.
(t) 1 And. 8, Moore 13, pl. 50; *ante* vol. I., p. *485.

erally correspond with the antecedent limitations in favor of issue male created by the same will.

These remarks assume that the principle which governs the application of phrases of this nature to limitations created by the same will, and to estates antecedently created, is identical. It seems difficult to find a solid distinction between the cases, especially where, as in Lanesborough *v.* Fox the testator refers to the settlement in describing the subject of disposition; the difference between the two cases, indeed, if any, would seem to be, that the courts would incline more strongly to the referential construction in the latter case, where the effect is to support a devise otherwise void, (*u*) than in the former, where, as an estate tail can generally be implied, the devise is valid *quacunque via.* The preferable ground, however, upon which Lanesborough *v.* Fox appears to stand, is afforded by the other words "and for want of heirs male of my own body;" for, as the testator had no estate tail, and none could be implied, it is clear that, unless the words could be held to refer to issue *living at the decease of the testator,* according to the rule discussed in the next chapter (*x*) (in which it will be seen there was considerable difficulty, inasmuch as the testator had a son living), the devise was void. (*y*)

Whether sons of an existing or future marriage were referred to.

The principle was again agitated in Jones *v.* Morgan; (*z*) where A having, on his marriage with B, settled certain estates upon himself and the sons of the marriage in tail male, with *reversion in fee to himself, and having two sons of the marriage, devised the estates, in case his said sons, *or any other son or sons of his thereafter to be born, should die without issue male of their bodies,* to his brother T. The question was, whether the testator, by the mention of "sons to be born," was to be understood as meaning after-born sons by his wife B (who was living), or as having in his contemplation the sons of a future marriage. If confined to sons of A's present marriage, it was a good devise of the reversion, as the contingency expressed by him (on which the devise was to take

(*u*) We are here speaking of the *old* law.

(*x*) *Post* p. *500.

(*y*) It is remarkable that Mr. Fearne, in his strictures on this case, Cont. Rem. 447, while he treats the want of the word "male" as a fatal omission in referring to the estate tail of the testator's son, seems to consider it not impossible that the words *for want of the testator's own heirs male* should be held to be referential to the son, though this hypothesis takes so much greater liberty with the testator's language.

(*z*) Butl. Fea. App. 578, 3 B. P. C. Toml. 322.

effect) embraced precisely the estates under the settlement, on the determination of which his own reversion would fall into possession, it being the same as if he had said, "Whereas my estate is settled upon my first and every other son in tail male by my marriage settlement; therefore, in case they all die without issue male of their body, I give it to my brother," which would clearly have been good as a devise of the reversion; and a circumstance much relied upon for this construction was, that the testator appointed B a guardian of his children and executrix of his will, which negatived the supposition of his contemplating a future marriage. (a) On the other hand, it was contended, that the expressions used by the testator included the sons of an after-taken wife, and, as such sons could not take an estate by implication, the limitation over to the testator's brother was an executory devise void for remoteness. Lord Camden sent a case to B. R., the judges of which certified their opinion that the event of a second marriage was not in the testator's contemplation, but that, if it were, the sons of that marriage took an estate tail. Lord Bathurst, who, in the meantime, had succeeded to the seal, concurred in the former branch of this certificate, and decreed accordingly; but he dissented from the opinion, that an estate tail was raised by implication, conceiving Lanesborough v. Fox to be a direct authority against it. The decree was affirmed in D. P., on the ground that a future marriage was not in the contemplation of the testator, and that the devise to his brother was therefore good. (b)

Words held to refer to subsisting estate tail.

But in Bankes v. Holme, (c) where lands having been limited, *upon the marriage of A with B, to the use of A for life, with remainder to trustees to preserve, with remainder to trustees for certain terms of years, with remainder to B for life, remainder to trustees to preserve, remainder to the first and other sons of the marriage in tail male, with remainder to the daughters as tenants in common in tail, with cross-remainders, with reversion to A, the settlor. in fee; A made his will, by which he recited that, by the

Words held not to refer to subsisting estates.

(a) See this principle applied to a different species of case, Wilkinson v. Adam, 1 Ves. & B. 422, *ante* p. *226.

(b) In Trafford v. Boehm, 3 Atk. 442, a devise, "after failure of issue" of the testator's wife by him, was construed as an immediate gift of the reversion, the words in question being referential to the subsisting limitations of their marriage settlement; but the will contained an express reference to the settlement (the particular limitations of which do not appear) for another purpose.

(c) 1 Russ. 394, n. See also Bristow v. Boothby, 2 S. & St. 465.

settlement in question, he was seized of or entitled to the reversion in fee simple expectant on the decease of his wife B, in case there should be no child or children of his said wife by him begotten, or there being such all of them should happen to depart this life *without issue.* The testator then, in case he should die without leaving any children or child, or there being such "all of them should happen to depart this life *without issue* lawfully begotten," devised the premises upon certain trusts. Sir J. Leach, V. C., held that this devise, being after a general failure of issue of the children, was too remote and void; and this decree was affirmed in D. P.

Lord Eldon observed in Morse *v.* Lord Ormonde (*d*) that this was a "very strong decision" (an expression which, in the mouth of this venerable judge, always means a *wrong* decision); and it seems, indeed, to be very difficult to reconcile it with the principles of the line of cases just stated. It was manifest from the recital of the settlement that the testator had in view the reversionary estate expectant on the limitations of the settlement, whatever that reversion was; and the terms used were merely an erroneous and mistaken reference to the events on which such reversion would fall into possession. The case seems irreconcilable with Jones *v.* Morgan, which it closely resembles. It is not likely that the decision will be followed.

Banks *v.* Holme questioned.

And this conclusion is fortified by Egerton *v.* Jones, (*e*) where, in pursuance of marriage articles, an estate at C. had been conveyed to the use of A for life, with remainder to B his wife for life, with remainder (subject to a term of 500 years for raising portions for younger children) to the use of the first and other sons of A and B successively in tail male, with remainder to the use of trustees for 600 years, upon certain trusts in the event of there being no male issue of A and B who should live to attain the age of twenty-one years, with remainder to the use of *A his heirs and assigns. A by his will devised as follows:—"And as to the reversion and inheritance of the freehold estate by me already purchased at C. aforesaid, and such other estate or estates as I shall hereafter purchase in pursuance of my marriage articles, *in case of failure of issue of my body by my said wife,* I give," &c. Sir L. Shad-

Devise on failure of issue held to be an immediate devise of reversion.

(*d*) 1 Russ. 406; [Sugd. Law of Prop. 351.]

(*e*) 3 Sim. 409; [and see Eno *v.* Eno, 6 Hare 171, further confirming the view taken in the text.

well, V. C., expressed a strong opinion that this devise operated as a valid immediate gift of the reversion; but it was not necessary for him to go further than to declare that the title depending on the opposite construction was too doubtful to be forced on a purchaser.

Remark on Egerton v. Jones.

If the V. C. had been called upon to adjudicate on this point of construction, it is conceived his decision must have been in accordance with his expressed opinion. Jones *v.* Morgan would have more than warranted, and even Bankes *v.* Holme would not have opposed, such a conclusion; for the court had not here (as in those cases) to supply words in order to restrict the issue spoken of in the will to the issue of a particular marriage (who were the tenants in tail under the settlement), the testator having in the will distinctly referred to the issue of that marriage. The sound rule would seem to be, that, wherever it may be collected from the general context of the will, that it is the testator's intention to dispose of his reversionary interest expectant on the subsisting estates tail, such intended disposition will not be defeated by the neglect of the testator to adapt his language with precision to the events on which the reversion will fall into possession. The consequence of rejecting this construction commonly has been (we have seen) to invalidate the intended devise of the reversion for remoteness (as depending upon a general failure of issue); but in this respect the act 1 Vict., c. 26 has made an alteration which is pointed out in the next section.

Suggested conclusion from the cases.

IV.—It remains only to consider how far the doctrines discussed in the present chapter are applicable to wills which are regulated by the existing law.

1 Vict., c. 26, § 29.

The statute 1 Vict., c. 26 § 29 provides, "that in any devise or bequest of real or personal estate the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of *such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, *by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise;* provided, that

Words importing a failure of issue to mean issue living at the death, except where merely referential.

this act shall not extend to cases where such words as aforesaid import *if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.* [6] (*f*)

It is evident, therefore, that the question, whether words importing a failure of issue refer to the objects of the preceding devise (which forms the main topic of the present chapter) may still arise under wills that are within the statute; and if this question be decided in the affirmative, the construction will not be in the least affected by the change in the law; (*g*) but if it be adjudged that the words under discussion do not refer to the objects of the prior devise, the result now will be widely different; for, instead of being construed (as formerly) to import an indefinite failure of issue, they must (unless the context forbids) be held to point exclusively to issue living at the death, and, consequently, can never under any circumstances, by their own intrinsic force, (*h*) have the effect of creating an estate tail by implication; so that to wills made or republished since 1837 no scope will be afforded for the doctrine of Doe *v.* Halley, Parr *v.* Swindels, and Doe *v.* Gallini, to the discussion of which so large a space has been devoted.

Remarks on failure of issue clause in the act.

The effect of holding the words in question *not* to refer to the issue who are the objects of a preceding devise, will be to render the estate of the *children*, conferred by such devise, determinable on the event of the parent dying without leaving *issue* living at his death, as in Hutchinson *v.* Stephens, (*i*) which is a result that ill accords with probable intention. Such a case, however, can only occur where the devise to the children, or any other class of issue, gives estates in fee, as it would under wills which are subject to the present law, even without words of limitation; for if the devise in question confers estates for life only, the determination of such estates is involved in the failure *of the issue whose extinction is the contingency on which the ulterior devise depends.

Effect under the act of rejecting the referential construction.

6. For similar statutory provisions in the United States, see *post* ch. XLI., note 14, p. 340.

[(*f*) See In re O'Bierne, 1 Jo. & Lat. 352; Harris *v.* Davis, 1 Coll. 416; Green *v.* Green, 3 De G. & S. 480; Dawson *v.* Small, L. R., 9 Ch. 651; all noticed ch. XLI., § 4.

(*g*) See In re Merceron's Trusts, 4 Ch. D. 182, *ante* p. *454 (will dated 1838, but statute not referred to.)

(*h*) See ch. XLI., *ad fin.*]

(*i*) 1 Kee. 240, *ante* p. *465.

We see, therefore, in the effect of the new law increased motive for adhering to the principle of Goodright *v.* Dunham and Malcolm *v.* Taylor, which it will be remembered authorize the proposition, that, where a devise to children in fee is followed by a devise over to take effect on the failure of the issue of the parent of such children, the words importing a failure of issue refer to the children or other issue who are the objects of the prior devise, which principle would, it is conceived, apply to devises embracing any other class of children, as sons or daughters. (*j*)

For instance, if lands are devised to A for life, with remainder to his sons, and if A should die without issue, then to B, each son of A under the original devise would, immediately on his birth, take a vested remainder in fee simple in his own aliquot share; and if the subsequent words were held merely to refer to the objects of the prior devise, the ulterior limitation of course would not disturb or affect such vested remainder; but if the words in question were adjudged not to bear this construction, but to point to issue of every degree living at the death of A, they would subject the vested estate of the sons of A to an executory devise, to take effect in the event of A dying without leaving issue *surviving him*, a result which it is conceived the courts, when applying the new rules of construction, will not hesitate to reject, in deference to the authority of the cases just referred to. The enactment which makes a devise pass the fee simple without words of limitation will, it is obvious, greatly extend the application of the doctrine of Goodright *v.* Dunham and Malcolm *v.* Taylor; and in this respect seems to operate very beneficially, in concurrence with that which reads words importing a failure of issue as denoting issue living at the death, when not simply referential to the issue described in the prior devise.

In the preceding remarks the statute has been regarded in its *effect only upon the *prior* estates. With respect to the *ulterior* estate, *i. e.*,

[(*j*) In Treharne *v.* Layton, L. R., 10 Q. B. 459, a testatrix by will, dated 1863, gave her real and personal estate to M. for life, and after her death to her *children;* M. to make a weekly allowance to R. during his life: if M. "dies *leaving* no *issue*," the whole of the property to go to the next of kin, they making the same allowance to R. during his life. M. had only one child, who died before her. It was held in Ex. Ch., affirming Q. B., that "leaving" must be construed "having had." The court proceeded wholly on the authority of Maitland *v.* Chalie, 6 Mad. 243, and similar cases, (as to which see ch. XLIX.,) and no reference was made to the statute, or (expressly) to the doctrine discussed in this chapter.]

the estate which is to take effect on the failure of issue, its operation is more decidedly beneficial, for it prevents such ulterior devise from being rendered void for remoteness, where the words "denoting the failure of issue" would have the effect neither of referring to the objects of the prior devises, nor of creating an estate tail by implication.

* CHAPTER XLI.

WORDS "DIE WITHOUT ISSUE," ETC., WHETHER THEY REFER TO FAILURE INDEFINITELY, OR FAILURE AT THE DEATH.

I. *General Rule.—Exceptions.*
II. *Circumstances and Expressions adequate to warrant the restricted Construction in regard to Real Estate.*
III. — *in regard to Personalty.*
IV. *Remarks on* 1 *Vict., c.* 26, § 29.

Die without issue, &c., when restricted to a failure of issue at the death.

I.—Another question which often occurs in the construction of words importing a failure of issue, is, whether they refer to issue indefinitely (*i. e.*, to a failure of issue at any time,) or to a failure of issue at the death. Upon this depends their operation to confer an estate tail; for it is only when the words denote an extinction of the specified issue irrespective of time or any collateral circumstance that they create such an estate.

Few points of testamentary construction have come more frequently under discussion than this; which has arisen, in a great degree, from the discrepancy between the popular acceptation and the legal sense of the phrase in question, and the consequent willingness to admit grounds for departing from the technical doctrine. In ordinary language, when a testator gives an estate to a person and his heirs, with a limitation over in case of his dying without issue, he means that the devisee shall retain the estate if he leaves issue surviving him, and not otherwise; and where the phrase is, in case the first taker die *before he has any issue*, or *if he have no issue*, the intention probably is that the estate shall belong absolutely to the devisee on his having issue born. But

General rule.

the established *legal* interpretation of these several expressions is different; for it has been long settled (though the rule, it will be remembered, now applies only to wills made before the year 1838,) that words referring to the death of a person without issue, whether the terms be, "*if he die without issue,*" "*if he have no issue,*" ["*if he die without having issue,*"] (*a*) "*if he die before he has*

[(*a*) Cole *v.* Goble, 13 C. B. 445.]

any issue," (*b*) or *"for want"* or *"in default of issue,"* unexplained by the context, and whether *applied to *real* or to *personal* estate, (notwithstanding the distinction taken between these two species of property in some of the early cases,) (*c*) are construed to import a *general indefinite failure of issue, i. e.,* a failure or extinction of issue *at any period.* (*d*) [1]

(*b*) Newton *v.* Barnardine, Moore 127, pl. 275. As to this expression applied to *children*, see *ante* p. *406.

(*c*) Pleydell *v.* Pleydell, 1 P. W. 748; Nichols *v.* Hooper, Id. 198.

(*d*) Fitz. 68; 2 Atk. 308, 376; [1 Vern. 478; 1 Eq. Abr. 207, pl. 9;] Amb. 398, 478; 2 Ed. 205, 3 B. P. C. Toml. 314; 1 B. C. C. 170, 188; 2 B. C. C. 33; 1 Ves., Jr., 286; 3 Ves. 99; 5 Ves. 440; 9 Ves. 197, 580; 17 Ves. 479; 1 Mer. 20; 1 B. & Ad. 318; 7 Bing. 226; [2 R. & My. 378; Id. 390; 16 Sim. 290; 2 Jo. & Lat. 176; 13 C. B. 445; L. R., 14 Eq. 283.]

1. In the absence of statute to the contrary, and of all words making a different intent apparent, words of limitation on failure of issue were construed at common law to mean indefinite failure, and not a failure at the first taker's death, Osborne *v.* Shrieve, 3 Mason C. C. 391; Parkman *v.* Bowdoin, 1 Sumn. C. C. 359; Williamson *v.* Daniel, 12 Wheat. 568; Moore *v.* Rake, 2 Dutch. 574; Brantly *v.* Whitaker, 5 Ired. L. 225; George *v.* Morgan, 16 Penna. St. 95; Wynn *v.* Story, 38 Id. 166; Covert *v.* Robinson, 46 Id. 274; Allen *v.* Henderson, 49 Id. 333; Amelong *v.* Dorneyer, 16 Serg. & R. 323; Heffner *v.* Knapper, 6 Watts 18; Lillibridge *v.* Ross, 31 Ga. 730; Robinson *v.* Bishop, 23 Ark. 378; Watkins *v.* Quarles, Id. 179; Fisk *v.* Keene, 35 Me. 349; Nightingale *v.* Burrell, 15 Pick. 104; Condict *v.* King, 2 Beas. 375; Den *v.* Small, Spencer 151; Tator *v.* Tator, 4 Barb. 431; Ferris *v.* Gibson, 4 Edw. 707; Jackson *v.* Billinger, 18 Johns. 368; Conklin *v.* Conklin, 3 Sandf. Ch. 64; Miller *v.* Macomb, 26 Wend. 229, affirming 9 Paige 265; Rice *v.* Satterwhit, 1 Dev. & Bat. Eq. 69; Bailey *v.* Davis, 2 Hawks 108; Matthews *v.* Daniels, 1 Murphy 42; Vaughan *v.* Dickes, 20 Penna. St. 509; Mengel's Appeal, 61 Id. 248; Gast *v.* Baer, 62 Id. 37; Kleppner *v.* Laverty, 70 Id. 70; Haynes *v.* Witmer, 2 Yea. 400; Mazyck *v.* Vanderhorst, 1 Bailey Eq. 48; Postele *v.* Postele, Id. 390; Cruger *v.* Heyward, 2 Desaus. 94; Presby *v.* Davis, 7 Rich. L. 105; McCorkle *v.* Black, Id. 407; Lyon *v.* Walker, 8 Id. 307; Curry *v.* Sims, 11 Rich. 489; Hamner *v.* Hamner, 3 Head 398; Brattleboro *v.* Mead, 43 Vt. 556; Williamson *v.* Ledbetter, 2 Munf. 521; Carter *v.* Tyler, 1 Call 163; Sydnor *v.* Sydnors, 2 Munf. 269; Newton *v.* Griffith, 1 Harr. & G. 111; Randolph *v.* Wendel, 4 Sneed (Tenn.) 647; Bramlet *v.* Bates, 1 Id. 572; Bowman *v.* Tucker, 3 Humph. 650; Kirk *v.* Ferguson, 6 Coldw. 479; Burroughs *v.* Foster, 6 R. I. 534; Arnold *v.* Brown, 7 Id. 188; Hollett *v.* Pope, 3 Harring. 542; Hill *v.* Burrow, 3 Call 342; Moody *v.* Walker, 3 Ark. 198; Voris *v.* Sloan, 68 Ill. 588; Riggs *v.* Sally, 15 Me. 408; Chism *v.* Williams, 29 Mo. 288; Torrance *v.* Torrance, 4 Md. 11; Jackson *v.* Dashiel, 3 Md. Ch. Dec. 257; Cox *v.* Buck, 5 Rich. 604; Tinsley *v.* Jones, 13 Gratt. 289; Thomason *v.* Andersons, 4 Leigh 118; Ingersoll's Appeal, 86 Penna. St. 240.

But this seems not to be the rule in Kentucky, irrespective of statute, Moseby *v.* Corbin, 3 A. K. Marsh. 289; Deboe *v.* Lowen, 8 B. Mon. 620; Moore *v.* Moore, 12 Id. 651; Daniel *v.* Thompson, 14 Id. 663; Birney *v.* Richardson, 5 Dana 424; Hart *v.* Thompson, 3 B. Mon. 487; Armstrong *v.* Armstrong, 14 Id. 333. Nor as to leaseholds, Allender *v.* Sussan, 33 Md. 11.

Two exceptions.

First, where phrase is, *leaving* no issue.

This rule, however, admits of two exceptions: the first is, where the phrase is *leaving* no issue; with respect to which the settled distinction is that, applied to *real* estate, it means an indefinite failure of issue,[2] but in reference to *personal* estate, (and real estate directed to be converted (*e*) is for this purpose regarded as personalty,) (*f*) it imports a

But every part of the will may be looked into to ascertain the intention of the testator in a particular devise, for the purpose of limiting the phrase "dying without issue" to a definite failure of issue, Lucas *v.* Duffield, 6 Gratt. 456.

2. Where a devise is to A for life, and at his death to the eldest male heir of his body, and upon the death of such heir to his male heir and his heirs forever, with limitation over if A die *without leaving* any male heir, an indefinite failure of issue was held to be clearly intended, and A took an estate tail, Malcolm *v.* Malcolm, 3 Cush. 472; so on death "without *leaving* lawful issue," Morehouse *v.* Cotheal, 1 Zab. 480, S. C., 2 Zab. 430, afterwards reversed; Newton *v.* Griffith, 1 Harr. & G. 111; Tongue *v.* Nutwell, 13 Md. 415; so a devise to children, to *descend* on their death to their children, and if any "die and *leave* no lawful issue," over, Haldeman *v.* Haldeman, 40 Penna. St. 29; Patterson *v.* Ellis, 11 Wend. 289. In this case, Savage, C. J., says, on page 292: "Both expressions, *viz.*, *dying without issue* and *dying without leaving issue*, are considered, as in truth they are, of exactly similar import. Ch. Kent has given us the names of those who supported the distinction and those who opposed it. In favor of it are Lord Macclesfield, Lord Mansfield and Lord Eldon; Lord Hardwicke both approved and condemned it, and is therefore neutralized. Those who denied any such distinction are Lord Thurlow, Lord Loughborough, Lord Alvanley, Lord Kenyon, Sir Wm. Grant, and the King's Bench, in 4 Maule & Selw. 62. To which might be added Sir Thomas Sewall and Sir Joseph Jekyl and some others. The weight of English authority, in my opinion, is decidedly against any such distinction. It is true that both in England and in this country courts have anxiously seized upon any expression or circumstance in the will which would limit the generality of the expression *dying without issue* or *without leaving issue*, or *for want of issue*, and confine it to issue living at the death of the first taker."

But, *contra*, a *definite* default of issue is intended by a limitation over if the first taker die "without *leaving*" issue, Daniel *v.* Thompson, 14 B. Mon. 662; Flinn *v.* Davis, 18 Ala. 132; Edwards *v.* Bibb, 43 Ala. 666; Harris *v.* Smith, 16 Ga. 545; Jones *v.* Speight, 1 Car. L. Repos. 544; Middlesworth *v.* Blackmore, 74 Penna. St. 414; Bentley *v.* Naufman, 3 W. N. C. 352; Usilton *v.* Usilton, 3 Md. Ch. Dec. 36; Robards *v.* Jones, 4 Ired. L. 53; Cudworth *v.* Thompson, 3 Desaus. 256; Carr *v.* Jeannerett, 2 McCord 66; Perry *v.* Logan, 5 Rich. Eq. 202; or "without leaving lawful issue surviving," Nicholson *v.* Bettle, 57 Penna. St. 386; or if he die

(*e*) As to the doctrine of conversion, see ch. XIX.

(*f*) Farthing *v.* Allen, 2 Mad. 310; but there was ground to contend that "issue" was here synonymous with *children* who were the objects of the preceding bequest. The judgment, however, is not reported, and the decree is silent as to the limitation over. The marginal note of the case omits the material word "leaving." [And see Hawkins *v.* Hamerton, 16 Sim. 410.]

failure of issue *at the death.* Under a devise therefore to A, or to A and his heirs, and if he shall die *and leave no issue*, or *without leaving issue*, then over, A would take an estate tail; but under a bequest of a term of years or other personal estate in the same language, A would take, not the absolute interest, (as he would if the indefinite construction prevailed,) but the entire interest of the testator defeasible on his

"leaving no issue *or child*," Hill *v.* Hill, 74 Penna. St. 173; Clapp *v.* Fogleman, 1 Dev. & Bat. Eq. 466; or "leaving no issue," Shiver's Estate, 9 Phila. 354; or in a devise to two "if either of them die, leaving no issue," Southerland *v.* Cox, 3 Dev. 394; or "if he should leave no children," Wight *v.* Baury, 7 Cush. 105; Fairchild *v.* Crane, 2 Beas. 105; Van Dyke *v.* Vanderpool, 1 McCarter 198; or "die and leave no heirs *then*" over, Dunn *v.* Bray, 1 Call 294; Goodell *v.* Hibbard, 32 Mich. 47; or "die and leave no issue," Eaton *v.* Straw, 18 N. H. 321; or a limitation over of what estate the first taker "may leave," Ide *v.* Ide, 5 Mass. 500; or prior to time of division "leaving no lawful issue surviving * * * then living," Manice *v.* Manice, 43 N. Y. 303; or "leave lawful issue that should live to the age of 21 years," Westenberger *v.* Reist, 13 Penna. St. 594.

But the following devises have been construed to refer to an indefinite failure of issue: To A and B, their heirs and assigns forever, but if they die without issue, over, Lillibridge *v.* Adie, 1 Mason C. C. 224; or "without *lawful issue*," Norton *v.* Fripp, 1 Spears 250; so if he die without issue, over, but in case he die leaving issue, "*then*" to divide, Hall *v.* Priest, 6 Gray 22; or then "to dispose of," Callis *v.* Kemp, 11 Gratt. 78; or if he die "unmarried or without issue," Jackson *v.* Billinger, 18 Johns. 368; so a devise to sons, and if they die without issue, "to my *surviving* children," Den *v.* Cook, 2 Halst. 41; Holcombe *v.* Lake, 1 Dutch. 605, affirming 4 Zab. 686; Lapsley *v.* Lapsley, 9 Penna. St. 190; Wall *v.* Maguire, 24 Id. 248; Doyle *v.* Mullady, 33 Id. 264; Clark *v.* Baker, 3 Serg. & R. 470; Caskey *v.* Brewer, 17 Id. 441; Bells *v.* Gillespie, 5 Rand. (Va.) 273; Stevenson *v.* Jacocks, 3 Murphy 558; so to children, and if either die without issue, "to the next elder * * * to descend to their lawful heirs from generation to generation," Gause *v.* Wiley, 4 Serg. & R. 509; or "without having heirs," Davidson *v.* Davidson, 1 Hawks 163; or "without children and heirs of her body," Shoemaker *v.* Huffnagel, 4 Watts & S. 437; or to A for life, with remainder to B and C, and if they die without lawful issue, "to my next of kin now living in Ireland," Toman *v.* Dunlap, 18 Penna. St. 72.

"A limitation over if the first taker should *die without leaving issue* or *leaving no issue*, has a different construction, and is valid or invalid, according as it may relate to personal or real estate. Where real estate is the subject of the limitation, it is construed to be after an indefinite failure of issue, and fails for remoteness. The word 'leaving' in such a case, is not restrictive," Dargan, Ch., in Perry *v.* Logan, 5 Rich. Eq. 202, 208. "Yet when used in connection with other words naturally meaning descendants of the first generation and other issue representing children by the statute of distributions, *leave* would retain its proper signification and be adequate as to any estate to restrict the failure of issue within the recognized limits of entailment," Wardlaw, Ch., in Addison *v.* Addison, 9 Rich. Eq. 58, 61. See Callis *v.* Kemp, 11 Gratt. 78; Tinsley *v.* Jones, 13 Id. 289; Whitworth *v.* Stuckey, 1 Rich. Eq. 404; Allender *v.* Sussan, 33 Md. 11.

(A's) leaving no issue at his death. Forth *v.* Chapman (*g*) is the leading authority for this distinction, but it has been confirmed by a long train of subsequent decisions (*h*) *extending down to the present period, which show that it applies even where the real and personal estate are comprised in the same gift. Lord Kenyon, indeed, in Porter *v.* Bradley (*i*) questioned the soundness of the doctrine; but his *dictum* is inconsistent with a multitude of authorities, and has received the pointed reprobation of both Lord Eldon (*k*) and Sir W. Grant; (*l*) the former emphatically declaring that it went "to shake settled rules to their very foundation." (*m*)

(*g*) 1 P. W. 663.

(*h*) As to personalty, Atkinson *v.* Hutchinson, 3 P. W. 258; Sabbarton *v.* Sabbarton, Cas. temp. Talb. 55, 245; Sheffield *v.* Orrery, 3 Atk. 282 (where the additional words "behind him"—as to which see *post*—were used); Lampley *v.* Blower, Id. 396; Sheppard *v.* Lessingham, Amb. 122; Gordon *v.* Adolphus, 3 B. P. C. Toml. 306; [Taylor *v.* Clarke, 2 Ed. 202]; Goodtitle *v.* Pegden, 2 T. R. 720; Daintry *v.* Daintry, 6 T. R. 307; Radford *v.* Radford, 1 Kee. 486; [Mansel *v.* Grove, 2 Y. & C. C. C. 484; Heather *v.* Winder, 5 L. J., (N. S.,) Ch. 41; Daniel *v.* Warren, 2 Y. & C. C. C. 290; Hawkins *v.* Hamerton, 16 Sim. 421.]

As to realty, Walter *v.* Drew, Com. Rep. 372; Denn *v.* Shenton, Cowp. 410; Tenny *v.* Agar, 12 East 253; Dansey *v.* Griffiths, 4 M. & Sel. 61; Wollen *v.* Andrewes, 2 Bing. 126; Doe d. Cadogan *v.* Ewart, 7 Ad. & Ell. 636, 3 Nev. & P. 197 (the judgment in which contains an elaborate statement of the authorities); [Doe d. Todd *v.* Duesbury, 8 M. & Wels. 530; Bamford *v.* Lord, 14 C. B. 708; Biss *v.* Smith, 2 H. & N. 105; Feakes *v.* Standley, 24 Beav. 485.

As to deeds. A limitation to A, *his heirs and assigns*, is cut down to an estate tail by a limitation over "if A dies without issue," Morgan *v.* Morgan, L. R., 10 Eq. 99, and cases there cited. Idle *v.* Cook, 1 P. W. 70, is not *contra;* though more than testamentary precision was there required in pointing out *whose* issue was meant, the words "in default of such issue" being held to fail in this respect. But in Olivant *v.* Wright, 9 Ch. D. 646, where the trust was to apply the rents of freeholds and leaseholds for the maintenance of A and B until the younger attained twenty-one, and on that event to pay the rents to A and B, their heirs, executors, administrators and assigns, provided, that if either died without *leaving* issue, his share should go over; it was held by Bacon, V. C., that this was confined to death during infancy, which not happening, the fee was absolute.]

(*i*) 3 T. R. 146.

(*k*) 9 Ves. 203.

(*l*) 19 Ves. 77. Lord Thurlow appears to have entertained the same opinion of this distinction as Lord Kenyon, for in Bigge *v.* Bensley he observed that the words *leaving* and *after* went far towards overturning the rule. Probably this expression tended to encourage Lord Kenyon (who was counsel in Bigge *v.* Bensley) in afterwards making his bold denial, in Porter *v.* Bradley, of the distinction, which, however, he expressly recognized in Daintry *v.* Daintry, 6 T. R. 314, though his decision is hardly consistent with that recognition.

As to supplying the word leaving.—(*m*) The introduction of the word "leaving" being so important in reference to personalty, the question often arises in such cases whether the word may be sup-

The circumstance that the prior gift is expressly for the life of the first taker, so that the effect of construing the word "leaving" to refer to issue *at the death* is that, in the event of there being such issue, the subject of disposition belongs to neither the prior nor the subsequent legatee, affords no ground for departing from this doctrine. (*n*) Nor, on the other hand, is the restricted construction of the words in question extended to *real* estate, merely because the subject of devise is a copy*hold estate, held of a manor the custom of which forbids the creation of entails, so that the effect of the contrary (*i. e.*, the indefinite) construction is that the first devisee takes a conditional fee on which no remainder can be engrafted, and the testator's intention, therefore, in favor of the ulterior devisee is defeated. (*o*)

Second exception to general rule.

The other exception to be noticed to the general rule is, where a testator, *having no issue*, devises property in default or on failure of issue *of himself;* in which case it is considered

plied; as where the testator in one part of his will uses the phrase "without leaving issue," and in another the words "without issue." In such case, the latter expression has been made by construction to correspond with the former in several instances where the general plan of the will seemed to authorize it: Sheppard *v.* Lessingham, Amb. 122; Radford *v.* Radford, 1 Kee. 486; *ante* vol. I., pp. *487, *531, *532; [see also Greenway *v.* Greenway, 2 D., F. & J. 128.] Pye v. Linwood.—Each of these phrases, however, seems to have been allowed to retain its own peculiar force in Pye *v.* Linwood, 6 Jur. 618, where a testator gave the residue of his property to his two children, John and Elizabeth, in manner following: one moiety to John, his heirs, executors, administrators and assigns, and in case of his decease without *leaving* lawful issue, then to Elizabeth and her heirs, executors, administrators and assigns; and the other moiety, together with the reversion of the former moiety, the executors were directed to invest in trust for Elizabeth for life for her separate use, and at her decease to go and be equally divided among all her children lawfully begotten, and in case of her decease *without lawful issue*, then to John: Elizabeth had only one child, who died in her lifetime. It was contended that the words "without lawful issue," in reference to the personalty, applied to issue living at the death, and that consequently the bequest over had taken effect; but Sir K. Bruce, V. C., held that the deceased child acquired an absolute interest.

Here it will be observed that there was sufficient difference in the mode of disposing of the several moieties to afford a strong suspicion that the testator might really not have had the same intention in each instance, and therefore the court seems to have been fully justified in adhering to the literal terms of the will. To divest the interest of a child who happened not to survive its parent was a result which the expounder of a will would not be disposed to strain the testator's language for the purpose of accomplishing. It does not appear whether the particular point for which the case is here cited was presented to the V. C.

(*n*) Andree *v.* Ward, 1 Russ. 260.

(*o*) Doe d. Simpson *v.* Simpson, 5 Scott 770, 4 Bing. N. C. 333, 3 Scott N. R. 774, 3 Man. & Gr. 929.

that the evident object of the testator is simply to make the devise contingent on the event of his leaving no issue *surviving him*, (*p*) and that he does not refer to an extinction of issue at *any* time.

Failure of testator's *own* issue, he having none.

Thus, in French *v.* Caddell, (*q*) where A, being married and having *no* issue, made his will, devising the land in question, "*in default of issue male and female of his own body*," upon trust to pay his debts and legacies and an annuity to his wife, and then to B and his issue in strict settlement. It was contended that this devise was void, as being to take place after an indefinite failure of issue, there being nothing to restrain it to the death of the testator. It was insisted on the other side, that he plainly meant a failure of issue living at the death, and that the contingency was determined the instant the will took place, *i. e.*, his death; and much stress was laid on the circumstance, that the trust was to pay debts, legacies and annuities, which he could not intend should take place 100 or 200 years after his death. The House of Lords decided in favor of the latter construction, giving validity to the devise.

Reference to testator's *own* issue.

So, in Wellington *v.* Wellington, (*r*) where a testator (who was *a bachelor*) devised, *in default of issue of his own body*, to trustees and their heirs, in trust to pay certain annuities until his debts and legacies should be paid, and, subject to the annuities, debts and legacies, he devised the estate in question to uses in strict settlement. Lord Mansfield held it to be a conditional devise, to take effect *at the death of the testator* if he left no issue, and therefore not to be an executory devise, which was a devise, he said, to take place *in futuro*.

It is observable that if the event which the testator provided against had happened, namely, his leaving issue, the *devise itself would have been revoked, marriage (which was necessarily involved) and the birth of a child being, even under the old law, *prima facie* a revocation. (*s*)

Again, in Lytton *v.* Lytton, (*t*) where A being seized in fee, subject to the limitations of marriage articles, whereby the lands were agreed to be settled on himself for life, with remainder to the first and other sons of the marriage in tail male, with reversion to himself in fee, and

(*p*) This is a very reasonable precaution, and should never be omitted where a testator is married, as his having and leaving issue would not revoke the will. See vol. I., p. *122.

(*q*) 3 B. P. C. Toml. 257.

(*r*) 4 Burr. 2165, 1 W. Bl. 645.

(*s*) *Ante* vol. I., p. *122.

(*t*) 4 B. C. C. 441.

not having any issue (his only child being just dead), made his will, whereby he devised, *on failure of issue male of his body*, the lands in question, upon trusts to raise money for paying debts and legacies (which included annuities), and subject thereto, to L. and his children to uses in strict settlement. Lord Northington (upon the authority of Lanesborough *v.* Fox) (*u*) held that the devise to L., being after a general failure of issue, was void, as being too remote. The question was afterwards brought before Lord Loughborough, who reversed his predecessor's decree, considering Lanesborough *v.* Fox to be inapplicable. He said, "Compare the circumstances of the present case with that, under the circumstances of the family: here the testator had had no child for several years: his only child was just dead. The devisee was his next and immediate heir, but he introduced the devise by the words 'in failure of issue male.' Could this mean more than to take in the event which alone prevented the estate from being the subject of an immediate devise? *He certainly had the articles in his contemplation at the time.* There was no prospect of issue at the time. It was not like Lord Lanesborough's Case, *who had issue*, and might have many more. It would be a harsh construction that the testator had here the idea of future issue in contemplation, and an indefinite failure of that issue: *he meant to give an immediate estate in possession at his decease.* Every clause in the will shows this intention. The other cases (Jones *v.* Morgan, (*x*) Wellington *v.* Wellington, and French *v.* Caddell) were all cases where, taking the words strictly, and construing them blindly, without considering the circumstances, the devise would have been upon a general failure of issue, and therefore void. It is manifest here he had no intention of giving an estate on a general failure of issue. *The circumstances of the testator and his family have always been taken into consideration in these cases.*"

*So, in Sanford *v.* Irby, (*y*) where the testator, having by his marriage settlement limited lands to the first and other sons of the marriage in tail in strict settlement, with reversion to himself in fee, and having a son and two daughters of the marriage, made his will, whereby he devised all his lands and real estate to his son and his heirs, subject to debts and legacies; but in case his son should depart

(*u*) *Ante* p. *489.

(*x*) *Ante* p. *490.

(*y*) 3 B. & Ald. 654. See also Doe *v.* Lucraft, 1 M. & Sc. 573, 8 Bing. 386, *ante* p. *468; where, however, it was not necessary to determine whether the words referred to a failure of issue at the death of the testator or indefinitely; the devise over being in the events which had happened void *quacunque via.*

this life without issue male, *or in case of failure of issue male of his* (the testator's) *body*, then he gave to his daughters certain legacies, which he charged upon his estates, and devised those estates to trustees, for the purpose of raising the "legacies by sale or mortgage;" and he then devised such parts of his real estate as should not be sold or mortgaged, *for want or in failure of issue of his body as aforesaid*, to his brother J. for life, remainder to his issue in strict settlement. And there was also a bequest of his personal estate, in case he should leave no son, or, leaving one son, he should afterwards die without issue before twenty-one, to his brother as therein mentioned. The Court of K. B. (on a case from chancery) certified that the devise of the real estate to testator's brother J. L. and his issue was valid.

According to the practice of courts of law (so often regretted), the reasons on which this opinion was founded are not stated. The case was argued, however, as falling within the principle of the class of cases just stated; or if not, it was contended that the words referring to the failure of the testator's own issue created an estate tail by implication in such issue; but, as the latter ground is clearly untenable, we are, it is conceived, warranted in referring the decision to the former.

Remarks upon Lytton v. Lytton and Sanford v. Irby.

It is observable, however, that in both Sanford *v.* Irby and Lytton *v.* Lytton there was some reason to contend that the words under consideration referred to the existing limitations of the settlement and articles, and therefore that the devise operated as an immediate gift of the reversion, (*z*) and some of Lord Loughborough's reasoning in Lytton *v.* Lytton seems to be directed to this point; (*a*) but as the general scope of his arguments is different, and no such ground was taken in Sanford *v.* Irby, and more especially as such a construction is opposed to the principle *upon which Lanesborough *v.* Fox was professedly decided, (*b*) (which has been the subject of comment in the preceding chapter), it is submitted that the safer, and, indeed, the inevitable course, is to treat Lytton *v.* Lytton and Sanford *v.* Irby as referable to, and confirmatory of, the rule of construction established by the anterior cases of French *v.* Caddell and Wellington *v.* Wellington.

It is to be observed that in Sanford *v.* Irby the testator *had a son*

(*z*) As to this, see *ante* p. *489.

(*a*) See the words of the judgment, *ante*, in italics.

(*b*) In Lanesborough *v.* Fox, the court was disinclined to supply even the word "male;" but here the words *issue* or *issue male* must have been held to refer to sons *of a particular marriage*. See Allanson *v.* Clitherow, 1 Ves. 24, *ante* p. *483.

and two daughters living; but as the death of the son formed one of the events upon which the estate was given over, and as the words under consideration referred to issue *male*, which excluded the daughters and their issue, it seems not to be distinguishable in principle from those cases in which the testator had no issue. It is also observable that Sanford *v.* Irby has been characterized by Sir L. Shadwell as a strong decision; (*c*) but it seems uncertain whether, in making this remark, he had in view the doctrine under discussion, or looked merely at the question whether the devise operated as an immediate gift of the reversion, which was the nature of the point then before him. It is also worthy of notice, that, in every case in which the construction in question has prevailed, the devise over was for the purpose of paying debts and legacies, and this possibly may have had some influence in restricting the application of the words referring to the failure of the testator's own issue to the period of his death. Indeed, it has been contended by an able writer to form the distinguishing feature of this class of cases, (*d*)—a conclusion, however, which is not sanctioned by the general reasoning of the judges who decided them. (*e*)

Effect of devise over being for payment of debts and legacies.

[But in In re Rye's Settlement, (*f*) Sir G. Turner, V. C., cautiously relied on both grounds. In that case a testator having no issue and being entitled under his marriage settlement to the reversion in fee in lands expectant on a life estate in himself and estates in tail male in his first and other sons by his wife then living, by his will noticing the settlement devised the lands, "in case he should *depart this life without leaving issue by his said wife," to his wife for life, with remainder to his brother for life, with remainder to trustees in fee, upon trust after the several deceases of his wife and brother to sell the lands, and out of the proceeds to pay £4000 to his brother's daughter at her age of twenty-one or day of marriage, and to pay the residue of the proceeds to the other children of his brother. "The cases appear to me (said

Devise in case of failure of testator's own issue upon trust to sell and pay a legacy.

(*c*) See Egerton *v.* Jones, 3 Sim. 417.

(*d*) Prior on Issue 93. Neither in Wellington *v.* Wellington, nor in Lytton *v.* Lytton, was the fact of the property being subjected to debts and legacies adverted to by Lord Mansfield or Lord Loughborough; and in French *v.* Caddell, and Sanford *v.* Irby, the grounds of the determination do not appear.

(*e*) This point is now of less importance, as it cannot arise under a will made or republished since 1837, the stat. 1 Vict., c. 26, § 29, making words importing a failure of issue refer to issue at the death.

[(*f*) 10 Hare 106.

the V. C.) to establish at least this proposition, that where the ulterior limitations in a will are made to depend upon a failure of issue of the testator, and there are found amongst the ulterior limitations provisions which could not reasonably be meant to depend upon a general failure of issue, the will is to be construed as referring to a failure of issue at the death, and not to a general failure of issue. The question is one of intention, and the context of the will proves the intention." He added that the fixing of the time for payment of the legacy of £4000 immediately after the deaths of the wife and brother appeared to him to be wholly inconsistent with the notion that the legacy was meant to take effect only upon the general failure of the testator's issue, and therefore to decide the question in favor of the gift over.] (*g*)

What will restrain the words generally.

But to return to the general rule. Though it is clear that, with the exceptions before noticed, the expressions to which it relates, applied to either real or personal estate, import an indefinite failure of issue, it is equally clear that in regard to either they will yield to a *clear* manifestation of intention in the context to use them in the restricted sense of issue *living at the death;* but, as to personalty, it seems they yield more readily to expressions and circumstances in the will tending so to confine them, than when applied to real estate.[3] Such, it is well known, is the conclusion of

(*g*) This connects the case with Nichols *v.* Hooper, *post* p. *510.]

3. In the case of a bequest of freedom to negroes, the negroes being *in esse* at the date of the will, the words "die without issue" mean a definite failure of issue, freedom being a personal privilege, and necessarily enjoyable, if at all, within a life in being, Woodland *v.* Wallis, 6 Md. 151.

In regard to personalty, a definite failure is inferred from any circumstance that affords ground for such inference, Ib.; Budd *v.* State, 22 Id. 48; Wallis *v.* Woodland, 32 Id. 101; Edelen *v.* Middleton, 9 Gill 161; Usilton *v.* Usilton, 3 Md. Ch. Dec. 36; Clagget *v.* Worthington, 3 Gill 83; Davidge *v.* Chaney, 4 Harr. & McH. 893; Porter *v.* Ross, 2 Jones Eq. 196; Cudworth *v.* Thompson, 3 Desaus. 256; Clifton *v.* Haig, 4 Id. 330; Brummet *v.* Barber, 2 Hill (S. C.) 543; De Treville *v.* Ellis, Bailey Eq. 40; Morehouse *v.* Cotheal, 2 Zab. 430. So, too, as to realty which the will directs to be turned into money, Perry *v.* Logan, 5 Rich. Eq. 202.

Speaking of the distinction between a devise of real and a bequest of personal estate, O'Neall, J., said: "Although there is *no such positive and substantial legal distinction*, yet there is no doubt that the court is not so strictly bound down to an artificial rule of construction in personal as in real estate, and that in the former they will lay hold of words to tie up the generality of the expression 'dying without issue' and confine it to dying without issue living at the time of the first taker's death, which would not have that effect in the latter (real estate)," Brummet *v.* Barber, 2 Hill (S. C.) 543, 551. See also Allender *v.* Sussan, 33 Md. 11. "We have also seen that in relation to execu-

Mr. Fearne (*h*) on this subject, though it cannot be denied that, since the period in which he wrote, this difference has been much narrowed; the later decisions having, on the one hand, overruled some of the grounds upon which words importing a failure of issue were formerly held, in reference to personalty, to receive a restricted construction, and having, on the other hand, given a restricted construction to the words in relation to *real* estate, by force of a context which in Mr. Fearne's period would not have been considered as authorizing it. Notwithstanding, however, this approximation of the two classes of *cases, there is still sufficient distinction between them to render it proper to treat of each class separately, and to suggest the remark, that the expressions which will cut down the established signification of the words, as applied to personalty, will not necessarily have that effect in reference to real estate; and, by parity of reason, where the restricted construction is adopted in relation to the latter, it applies *a fortiori* to the former. This diversity of construction in regard to real and personal estate appears to have originated in an anxiety to avoid an interpretation which would render any part of the will inoperative; for as a gift of *personalty* to arise on a general failure of issue is void for remoteness, (*i*) it follows that the construing of the words under consideration in their unre-

Difference where applied to real and personal estate.

tory bequests of personal estates, these words may be restricted to mean a dying without issue living at the death of the party, by any clause or circumstance in the will, that can indicate or imply such intention in the testator, and that in order to support the limitation over if they can, courts generally incline to lay hold on any expression or circumstance in the will that seems to afford a ground for such a construction," Buchanan, C. J., in Biscoe *v.* Biscoe, 6 Gill & J. 232, 237.

In bequests of personalty, the following expressions have been held to mean a definite failure of issue: "if the son shall die without lawful issue and before he possess," Edelen *v.* Middleton, 9 Gill 161; "without leaving issue *or children*," Clapp *v.* Fogleman, 1 Dev. & Bat. Eq. 466; Boone *v.* Barnes, Rich. Eq. Cas. 357; "but should the said C. P. die without children to heir the said negroes," Brummet *v.* Barber, 2 Hill (S. C.) 543; "should die before having lawful issue," Marshall *v.* Rives, 8 Rich. 85; "which is entailed to her brothers, she leaving no lawful issue," Pritchett *v.* Cannon, 10 Rich. Eq. 394.

But, even in gifts of personalty, the mere circumstance that the limitation over is to a person *in esse* will not, of itself, be sufficient to restrict the words "dying without issue" to mean a dying without issue at the death of the first legatee, Usilton *v.* Usilton, 3 Md. Ch. Dec. 36.

(*h*) Cont. Rem. 471.

(*i*) See rule against perpetuities discussed, vol. I., p. *250. [But, as observed by Wood, V. C., 1 K. & J. 89, the ulterior gift may be void for remoteness though the failure of issue is not indefinite, as, if the failure is limited to twenty-five years from the testator's death.]

stricted sense is fatal to the bequest over depending on them; whereas in their application to *real* estate, they have, when so construed, the effect of creating in the prior devisee an estate tail, and the limitation which it is their office to introduce is then a remainder expectant on that estate.[4]

When restricted in regard to *realty*.

Where the dying refers *to a given age*.

II.—We now proceed to inquire into the grounds upon which words importing a failure of issue are restrained to such failure *at the death*, in regard to *real* estate.

1. It is clear that they receive this construction where the event of dying is confined to *a definite age*.

Thus a devise to a person and his heirs, with a limitation over if he shall die *under the age of twenty-one and without issue*, is construed, not as creating an estate tail, with a contingent remainder dependent on the event of the first taker dying under the specified age (as would be the effect, if the words were considered to import an indefinite failure of issue,) (*j*) but as a devise *in fee simple*, subject to an executory limitation over in the event of the prior devisee's death under the given age and leaving no issue *surviving him*. (*k*)[5]

*That the principle of the preceding cases applies wherever the dying without issue is restricted to (whether it be *above* or *under*) a particular age, may be inferred from Glover *v.* Monckton, (*k*) where

4. Wallis *v.* Woodland, 32 Md. 101; Clapp *v.* Fogleman, 1 Dev. & Bat. Eq. 466.

(*j*) Such was the doctrine of the early authorities; and it seems to be more consistent with principle than that which subsequently obtained. See Soulle *v.* Gerrard, Cro. El. 525. [Such also would still be the construction if the prior limitation were expressly to A and the heirs of his body, Grey *v.* Pearson, 6 H. L. Cas. 61. And see Marshall *v.* Grime, 28 Beav. 375.]

(*k*) Hinde *v.* Lyon, 3 Leon. 64; Price *v.* Hunt, Pollex. 645; Eastman *v.* Baker, 1 Taunt. 174; [Hanbury *v.* Cockerill, 8 Vin. Ab. Dev., n. (*a*), pl. 4; Anon., Dyer 124, a, 354, a; and see 17 Beav. 201.] And in Hall *v.* Deering, Hardr. 148, the point was much discussed, but no opinion was given by the court.

5. A devise to A for life, and after his death to his heirs lawfully begotten, with a limitation over if he die without leaving issue, or before he arrive at twenty-one, creates a contingent fee, with an executory devise over on definite failure of issue, Brogdon *v.* Walker, 2 Harr. & J. 285; Ray *v.* Enslin, 2 Mass. 53; Jackson *v.* Blanshan, 3 Johns. 292; Dallam *v.* Dallam, 7 Harr. & J. 220; Hauer *v.* Shitz, 3 Yea. 205; Watkins *v.* Sears, 3 Gill 492; Carr *v.* Jeannerett, 2 McCord 66; so "if he die without issue either before or after coming of age," Booker *v.* Booker, 5 Humph. 508.

See also Chew *v.* Weems, 1 Harr. & McH. 463; Rivers *v.* Fripp, 4 Rich. Eq. 276; Perry *v.* Logan, 5 Id. 202; Holcomb *v.* Lake, 1 Dutch. 605.

(*k*) 3 Bing. 13.

real estate was devised to trustees, upon certain trusts until the testator's son should attain twenty-one, and, when he should arrive at that age, in trust for him, his heirs, &c.; but in case his son should not live to attain such age of twenty-one years, and the testator's daughter should be living at the time of the decease of his son, *or in case his son should live to attain such age, but should afterwards die without lawful issue,* then in trust for the daughter for life, with remainders over. The son attained twenty-one; and the Court of C. P., on a case from chancery, certified that he took an estate in fee *with an executory devise over* in the event of his dying without having issue *living at his death.*

Suggested extent of the principle.

The same principle probably would be considered as extending to every case in which a dying without issue is combined with *an event personal to the individual,* as the event of his dying without issue and unmarried or without leaving a husband or wife—which is the meaning of "unmarried" in this situation. (*l*)

[With some aid from the context it was applied in Doe d. Johnson *v.* Johnson, (*m*) where the testator devised lands to his wife for life, with remainder to his nephew Samuel and his heirs, but in case his nephew should die before he attained the age of twenty-one, or after he should have attained such age of twenty-one should die unmarried, or having been married should die without lawful issue, then over. It was held that the nephew took an estate in fee, with an executory devise over on the happening of any of the three specified events, and that the last event was his death without leaving issue surviving him. Martin, B., who delivered the judgment of the court, said, "The first two events directly point to the period of his (Samuel's) death; and it would be a very forced construction of the devise to hold that the third event pointed, not to his death without leaving issue then living, but to the failure of issue of his body at any period however remote. The same words 'shall die' are in the devise directed to both events, viz., 'being unmarried,' and 'without lawful issue,' and we think that it was the state of things existing at Samuel's death which was to *determine whether the future estate was to come into enjoyment or not."] (*n*)

(*l*) See vol. I., p. *521.

[(*m*) 8 Ex. 81; but see O'Donohoe *v.* King, 8 Ir. Eq. Rep. 185.

(*n*) See also Mahaffey *v.* Rooney, 5 Ir. Jur. 245; Greated *v.* Greated, 26 Beav. 621. And compare Feakes *v.* Standley,

Devise over on issue dying under age, not restrictive.

But it seems that the words referring to a failure of issue are not restricted to such failure at the death by the mere insertion of the contingency of the issue dying under age. Thus, if real estate be devised to A and his heirs, with a devise over in case A should die without issue, or such issue should die under the age of twenty-one years, A would be tenant in tail; for it is said, that does not necessarily show that the testator is speaking of a failure of issue at the death of A. He is speaking of a general failure of issue, and then he alludes to the case of there being issue, and their dying under the age of twenty-one, *which is a limited portion of the contingency which is expressed by the preceding words.* (o) But it is not by any means necessary that, because he has used words which have very little meaning, therefore the words "dying without leaving lawful issue," which signify a general failure of issue, must signify a leaving of lawful issue living at his death. (p)

Effect of a collateral event being associated.

What is the construction of the words, where the dying without issue is restricted *to some definite period collateral to the devisee,* (as in the case of a devise to A and his heirs, with a devise over in case he should die without issue *in the lifetime of B,*) is a point which is [or until recently was] involved in uncertainty. Three constructions present themselves: 1st, To read the words as applying to the contingency of A dying in the lifetime of B without leaving issue living at his (A's) death; 2ndly, As pointing to the event of A dying in the lifetime of B, and of there being a failure of issue at *any* time, *i. e.,* during the life of B, or afterwards; 3rdly, As denoting the event of A dying, and of there being an extinction of his issue, but both events happening in the lifetime of B. The second construction would seem to be the most consistent with the general rule which reads these words as importing a general failure of issue where the context does not demand a different construction; for the fact, that the words are associated with a collateral event, seems not to afford a valid ground for departing from the ordinary construction; and if so, the devisee would be *tenant in tail, with a contingent remainder to take effect in the event of his dying in the lifetime of B.[6]

24 Beav. 485, observing that the event was there not "personal to the individual."]

(o) *I. e.,* it is a contingency compounded of two events, one of such events being comprised in the other, and therefore superfluous.

(p) Per Sir L. Shadwell, in Grimshawe v. Pickup, 9 Sim. 596.

6. Lesly v. Collier, 3 Rich. Eq. 125; Goldsborough v. Martin, 41 Md. 488.

In the well-known case of Pells *v.* Brown, (*q*) however, the court seemed to incline to the first construction, [and decidedly negatived the second construction, which would have given A an estate tail.] But the case did not raise the [question between the first and third constructions.] An example of the third construction applied to a bequest of personalty occurs in Crowder *v.* Stone, (*r*) where a testator bequeathed stock to his executors, in trust for A for life, and after her decease to B for life; and after the decease of the survivor the stock was to be sold, and the produce divided between the testator's nephew and four nieces, and, in case of the decease of any of them *without lawful issue before their respective shares should become due and payable,* then the part or share of him, her or them so dying without issue as aforesaid to go to the survivor: Lord Lyndhurst held that the share of a niece who died before the period of distribution, leaving a son who afterwards also died before that period, passed under the executory gift to the survivor. [He said "'Death without lawful issue' denotes generally an indefinite failure of issue. But in this case a time is limited within which the failure of issue is to take place, and that is the time when the fund is to become divisible." So, in Jarman *v.* Vye, (*s*) where by will dated 1845 a testator

Crowder v. Stone.

Pells v. Brown.—(*q*) Cro. Jac. 590. The devise was to the testator's son Thomas and his heirs forever, and if he died without issue living William his brother, then William to have those lands to him and his heirs and assigns forever: Thomas suffered a recovery, and died without issue leaving William: and it was held that this was not an estate tail in Thomas, but an estate in fee, subject to an executory devise; for it was said the clause, *if he died without issue,* was not absolute and indefinite, whensoever he died without issue, but it was with a contingency, if he died without issue *living William,* for he might survive William, *or have issue alive at the time of his death,* living William, in which case William should never have it. As Thomas seems not to have left issue surviving him, it was not necessary to determine whether, if he had left issue, and such issue had afterwards died in the lifetime of William, the executory devise would have taken effect. [See also Doe d. Knight *v.* Chaffey, 16 M. & Wel. 656, 665, where the gift over is called an executory devise.]

(*r*) 3 Russ. 217.

[(*s*) L. R., 2 Eq. 784.] The reports do not present many instances of devises to take effect on the death of a preceding devisee without issue within a definite period. Among the few cases of this nature is Bennett *v.* Lowe, 5 M. & Pay. 485, 7 Bing. 535, *ante* p. *477, where the devise over was to take effect on the decease and failure of issue of the prior devisees *before the death of the annuitants;* but this peculiarity in the case does not appear to have attracted much attention, and the construction adopted by the court rendered it immaterial, so that the case really throws very little light on the point under consideration.

gave a legacy to A, a freehold house and the furniture therein to B, and another freehold house with the furniture to C; and directed that, if A, B and C should all (*t*) die before attaining *twenty-one, or in the lifetime of E without leaving lawful issue, the legacy or share of him or her so dying should go to the survivor or survivors. B attained twenty-one, and died before E, leaving one child, who also died before E. It was held by Sir W. P. Wood, V. C., that the case could not be distinguished in principle from Crowder *v.* Stone, and that, as B died in the lifetime of E without leaving issue living at the death of E, the gift to the survivors took effect.] (*u*)

Effect of additional expressions.

II.—2. The next species of case to be noticed is, where expressions are added to the words importing a failure of issue, showing that the testator used those words in a restricted sense.

Express reference to the death of the prior devisee.

Where the testator expressly devises over the estate in the event of the preceding devisee dying without leaving issue *living at the time of his death*, the language of the will seems to exclude all controversy; and yet we have an adjudication on this simple point in Doe d. Barnfield *v.* Wetton. (*v*)

The restricted construction, however, has been sometimes adopted where the intention was much less unequivocally expressed.

"Leaving no issue BEHIND HIM."

Thus, in Porter *v.* Bradley, (*x*) where the testator devised certain lands to his son P., his heirs *and assigns* forever; but his will was, that in case he (P.) should happen to die *leaving no issue* BEHIND HIM, then that his (testator's) wife should take the rents, and have his in-door goods, as long as she should continue his widow, and no longer; and after her decease or

[(*t*) "All" was admitted to be a mistake for "any," *ante* vol. I., p. *504.

(*u*) In Ex parte Bate, 11 W. R. 417, 1 N. R. 470, the only question was whether James Bate (who was still living) was tenant in tail, or tenant in fee simple subject to an executory devise over if he died before his brother "having no issue," *i. e.*, within *some* limited period, and Wood, V. C., held the latter. It was probably the ultimate gift over, if both brothers died "without issue," that influenced the court (under the wills act—as to which see *post* § 4) in favor of the first construction. The third was not alluded to.

(*v*) 2 B. & P. 324; [and see Verulam *v.* Bathurst, 13 Sim. 388. But if there is a previous *express* limitation in tail, although the restricted construction may be right, yet the nature of the previous devisee's estate is not altered; *ante* pp. *445, *505, n.]

(*x*) 3 T. R. 143. [The words "and assigns" point to a fee, per Wood, V. C., 1 K. & J. 81.]

marriage then the lands so devised to P. as aforesaid, the testator gave, *for want of issue by him as aforesaid*, unto his son J. and his heirs, chargeable with £50 apiece to the testator's daughters and their issue within a twelvemonth after he (J.) should enjoy the same; but in case J. should die before P., and P. *should not leave any issue of his body begotten*, then the testator directed the lands to be sold, and the money paid to the daughters. The Court of *K. B. held, upon the authority of Pells *v.* Brown, that the words imported a dying without issue living at the death, considering the words "leaving no issue behind him" as equivalent in point of fact to the words "living William" in that case; and Lord Kenyon considered the subsequent parts of the will to convey the same idea; for the devisor had mentioned (*quære* treated?) this event as likely to happen in the lifetime of his widow or of his younger son or daughters.

This case has been considered as standing upon the effect of the words "*behind him.*" (*y*)

II.—3. Another class of cases in which the restricted construction of the words under consideration has been adopted consists of those in which the arguments for that construction have been derived from the nature of the subject matter and terms of the ulterior devise.

Implicatory grounds of restriction from nature of devise over.

Thus, in Nichols *v.* Hooper, (*z*) which seems to be the first case of this kind, the circumstance of the lands being chargeable with moneys to be paid within a definite period after the decease of the first taker, was held to cut down the words in question to a dying without issue *at the death.* The devise was to M. for life, remainder to her son T. and his heirs, provided that if T. should die *without issue of his body*, then the testator gave £100 apiece to A and B, *to be paid within six months after the decease of the survivor of the said mother and son by the person who should inherit the premises;* and, in default of payment, the testator gave the land to the legatees for payment. It was held that the words here referred to a dying without issue at the death, and that the issue having survived

Legacy to be paid within a given period after the death.

(*y*) Many cases regarding the restrictive operation of particular expressions will be found under the section applicable to bequests of personal estate. As to the phrase *on the decease*, in reference to realty, see Doe d. King *v.* Frost, 3 B. & Ald. 546, *post* p. *516.

(*z*) 1 P. W. 193, 2 Vern. 686; [and see In re Rye's Settlement, 10 Hare 106, *ante* p. *503.]

the son, though they failed within the six months, the legacies did not arise.

Remarks upon Nichols v. Hooper.

The Lord Keeper laid much stress upon the circumstance of the subject of the ulterior gift being *legacies*, which shows that he regarded it as a bequest of personalty; but the case clearly did not fall within the principle of cases of this description; for even if the words had been held to import a general failure of issue, inasmuch as T. would in that case have been tenant in tail, the legacies payable on the determination of T.'s estate (being barrable by a recovery) would have been good. (*a*) The case, *therefore, wanted the great influencing motive to the restricted construction in reference to bequests of personal estate, namely, that the contrary interpretation would have invalidated the bequest over.

It seems, however, to have been regarded in the profession as a case of this nature; (*b*) to which probably may be ascribed the fact that, for nearly a century, (*c*) no other instance occurred in which the restricted construction was attempted to be supported, *in regard to real estate*, on any such grounds: the general impression being, it should seem, that the words in question, applied to realty, were not susceptible of restriction from circumstances or expressions affording inference merely.

Same construction in Blinston v. Warburton.

[The question was again raised in Blinston *v.* Warburton, (*d*) where the devise was of a house to testator's daughter Sarah in consideration of her paying £50 to Anne C., and in case Sarah died without lawful issue the said house to go to testator's son Thomas or his heirs in consideration that he should pay to testator's son Joseph or his heirs the sum of £250 twelve months after Sarah's death. Sir W. P. Wood, V. C., held that Sarah took an estate in fee with an executory devise over. He thought there could have been no doubt on the point if the limitation had been to Sarah expressly in fee, and he addressed himself chiefly to the question whether the result was the same here, where the fee was given only by implication from the imposition of the charge directed to be paid by Sarah.

One of the grounds on which the restrictive construction has been held justified by the terms of the ulterior devise is that, on the failure

(*a*) Goodwin *v.* Clark, 1 Lev. 35. See *ante* vol. I., p. *255, n. (*q*).

(*b*) See Fearne C. R. 471.

(*c*) The next case was Porter *v.* Bradley, 3 T. R. 143.

[(*d*) 2 K. & J. 400.

of issue in question, the devise is to the then survivors of certain persons living at the testator's death. Thus, in Greenwood *v.* Verdon, (*e*) where the testator gave legacies to certain persons by name, and then devised all the residue of his personal property and all his real estate to his wife and son for their lives, and after the decease of the wife, to the son, his heirs *and assigns* forever, and from and after the decease of the wife and of the son without issue, to be equally divided among the *then surviving legatees*, share and share alike;[7] Sir W. P. Wood, V. C., held that the failure of issue of the son was restricted by the ulterior gift, and that the son took an estate in fee, with an executory gift over if he died without issue living at the death *of the last surviving legatee; and there being issue living at that period, that the estate in fee became absolute. The V. C. said: "When the gift is upon the death of the first taker without issue to the then surviving legatees, that is to those persons named in the will who should then be surviving, it

Gift on death without issue to persons then surviving.

(*e*) 1 K. & J. 74.]

7. Where the limitation over is to others or survivors of the class of, or surviving heirs or children of, the first taker, a definite failure of issue is generally intended, Deboe *v.* Lowen, 8 B. Mon. 616; Brightman *v.* Brightman, 100 Mass. 238; Den *v.* Schenck, 3 Halst. 29, overruling Den *v.* Moore, Coxe (N. J.) 386; Den *v.* Allaire, Spencer 15; Fairchild *v.* Crane, 2 Bess. 105; Seddel *v.* Wells, Spencer 223; Anderson *v.* Jackson, 16 Johns. 382; Lion *v.* Burtis, 20 Id. 483; Zollicoffer *v.* Zollicoffer, 4 Dev. & Bat. L. 438; Russ *v.* Russ, 9 Fla. 105; Jackson *v.* Chew, 12 Wheat. 153; Clark *v.* Terry, 34 Conn. 176; Hart *v.* Thompson, 3 B. Mon. 487; Richardson *v.* Noyes, 2 Mass. 61; Gray *v.* Bridgforth, 4 Geo. (Miss.) 312; Norris *v.* Beyea, 13 N. Y. 273; Dumond *v.* Stringham, 26 Barb. 104; Pinckney *v.* Pinckney, 1 Bradf. 269; Wilkes *v.* Lion, 2 Cow. 385; Fosdick *v.* Cornell, 1 Johns. 440; Moffat *v.* Strong, 10 Johns. 12; Cutter *v.* Doughty, 23 Wend. 513; Hilliard *v.* Kearney, 1 Busbee Eq. 221; Threadgill *v.* Ingram, 1 Ired. L. 577; Rapp *v.* Rapp, 6 Penna. St. 49; Bedford's Appeal, 40 Id. 18; Johnson *v.* Currin, 10 Id. 498; Mifflin *v.* Deal, 6 Serg. & R. 460; Seibert *v.* Butz, 9 Watts 490; McCorkle *v.* Black, 7 Rich. L. 407; Carson *v.* Kennerly, 8 Id. 259; Cordle *v.* Cordle, 6 Munf. 455; Williams *v.* Turner, 10 Yerg. 289; Rucker *v.* Lambdin, 12 Sm. & M. 31; Williams *v.* Graves, 17 Ala. 62; McGraw *v.* Davenport, 6 Port. (Ala.) 319; Cox *v.* Buck, 5 Rich. 604; De Treville *v.* Ellis, Bailey Eq. 40; Stevens *v.* Patterson, Id. 42; Lowry *v.* O'Bryan, 4 Rich. Eq. 262; Gillam *v.* Caldwell, 11 Id. 73; Broaddus *v.* Turner, 5 Rand. (Va.) 308; Ingersoll's Appeal, 86 Penna. St. 240. But see Hoxton *v.* Archer, 3 Gill & J. 199; Nowlin *v.* Winfree, 8 Gratt. 346. See also Ketchin *v.* Beaty, 5 Rich. Eq. 83.

In a devise to four sons, and if either "die without children," to his brothers, a definite failure is meant, as shown by the limitation over to the others, Morgan *v.* Morgan, 5 Day 517; Jordan *v.* Roach, 3 Geo. (Miss.) 481; and with limitation over to a stranger, Burton *v.* Beach, 30 Ga. 638. But see Cox *v.* Buck, 5 Rich. 604.

cannot be a transmissible interest" (*i. e.*, not vested in possession) "which is given to them; and the only interest which they could take must be one which would accrue on their surviving the specified period, and therefore it must necessarily be a personal benefit that was intended for these legatees; and the period at which it was to take effect being upon the failure of issue of a preceding devisee, I cannot regard the limitation as pointing to an indefinite failure of issue, but a failure which might take place in the lifetime of those legatees who were named in the will."

Such a case therefore is one to which the doctrine of Crowder *v.* Stone (*f*) is applicable.

The intention to confer a personal benefit (on which the restricted construction immediately depends) is not shown unless the ulterior devisees are to survive not only the prior devisee but also his issue; *i. e.*, unless they are to be living at the period of possession. (*g*) And unless they are persons living at the testator's death, the intention to confer a personal benefit, indeed, might appear, but the restricted construction would not be justified, because an indefinite failure of issue is not inconsistent with personal enjoyment by the devisees if these may be born at any time after the testator's death. (*h*)

Words restricted by alternative gift to issue (if any) at the death.

Again, in Gee *v.* Corporation of Manchester, (*i*) where a testator gave one-seventh of his real and personal property to each of his seven sons and daughters, his or her heirs, executors and administrators, and if any of them "die without issue, that their share returns to my sons and daughters, equally amongst them, and if any of my sons and daughters die and leaving isue, that they take their deceased parent's share, share and share alike;" it *was held that the words "if any die without issue,"

[(*f*) *Ante* p. *508.

(*g*) 1 K. & J. 83, citing Garratt *v.* Cockerell, 1 Y. & C. C. C. 494, a case of personalty, *post* p. *528. See also Chadock *v.* Cowley, Cro. Jac. 695. In Ex parte Hooper, 1 Drew. 264, 21 L. J., Ch. 402, stated *ante* p. *466, Kindersley, V. C., appears not to have regarded this distinction. But the opinion of this eminent lawyer, though weighty, was extra-judicial; for, as the children of H., the tenant for life, were held to take vested interests at birth, it was unnecessary to decide whether the gift over pointed to failure of objects of the preceding devise, (which had not happened,) or (as the V. C. is reported to have ruled) to failure of *issue* living at the death of H., (which also had not happened,) or to an indefinite failure, so as to give H. an alternative remainder in tail if the remainder in fee to her children had not taken effect.

(*h*) 1 K. & J. 83, citing Candy *v.* Campbell, 2 Cl. & Fin. 421, 8 Bli. 469.

(*i*) 17 Q. B. 737.

did not import a general failure, so as to create an estate tail in the parent; for the latter part of the clause expressly provided that if there was issue, they (that is *all* the issue) should take their parent's share, share and share alike; whereas, if the former part of the clause were construed to give an estate tail, the eldest son *only* would take his parent's share, and the two parts would thus be inconsistent.

Ulterior gifts being *for life* only.

Another ground upon which the restricted construction has been adopted is, that the ulterior devises confer estates *for life* only.

Thus, in Roe d. Sheers *v.* Jeffery, (*k*) where a testator devised to his daughter A for life, and after her death to his grandson B and to his heirs forever; but in case B should depart this life *and leave no issue*, then his will was that the said premises should be and return *unto E., M. and S. or the survivors or survivor of them, equally to be divided between them;* Lord Kenyon, after citing Pells *v.* Brown (*l*) as a leading authority, said: "On looking through the whole of this will, we have no doubt that the testator meant that the dying without issue was confined to a failure of issue at the death of the first taker; for the persons to whom it is given over were then in existence, *and life estates are only given to them.*"

Lord Hardwicke in Trafford *v.* Boehm (*m*) seems also to have entertained an opinion that words referring to a dying without issue, followed only by limitations for life, were "confined to a failure of issue during the lives in being;" but the case before him did not raise the question, as the devise (which was of money to be laid out in land) operated as an immediate disposition of the reversion.

Observations on Roe *v.* Jeffery.

That the mere circumstance of the subsequent estates being for life only should be made a ground for varying the construction is extraordinary, since it is every day's practice to limit an estate for life in remainder after an estate tail, which involves precisely the absurdity which is here supposed to flow from holding the words to import an indefinite failure of issue. Indeed, this view of the case appears to have been a surprise to the parties; for, in the opinions of counsel taken on behalf of the ulterior devisee, (with a perusal of which the writer has been favored,) the only ground upon which his claim was considered *to be tenable (if at all) was, that Porter *v.* Bradley (*n*) had decided, in opposition to former

(*k*) 7 T. R. 589.
(*l*) *Ante* p. *508, n.
(*m*) 3 Atk. 449.
(*n*) *Ante* p. *509.

authorities, that the words *leaving* no issue, *per se* and *without any aid from the context*, were to be construed *leaving no issue living at the death.* As this hypothesis, however, is clearly overthrown by the long line of authorities before referred to, (*o*) Porter *v.* Bradley and Roe *v.* Jeffery must rest on their peculiar circumstances, *i. e.*, the former on the explanatory force of the superadded words "behind him," and the latter on the circumstance of the devises over being exclusively for life.[8]

But all the estates must be for life.

At all events, it is clear that the doctrine of Roe *v.* Jeffery applies only where *all* the ulterior estates are merely for life; for in Barlow *v.* Salter (*p*) Sir W. Grant refused to extend it even to a bequest of personal estate where *one* of several ulterior legatees took a *life* interest and the others *absolutely.* "It appears in some of the early cases," he said, "that the judges inclined to hold these words to mean without issue at the death of the person named; but ever since Beauclerk *v.* Dormer (*q*) I think a different rule has prevailed; and it is now settled that, *unless there are expressions or circumstances from which it can be collected that these words are used in a more confined sense, they are to have their legal signification, viz., death without issue generally.* The court ought not certainly to profess to adopt one of these rules, and yet to proceed as if the other was the right one, which however is done when the meaning of the words is held to be narrowed by expressions or circumstances that do not raise any fair inference of a restricted intention. The single circumstance in this case relied upon in favor of the restricted construction is, that one of the four persons to whom the bequest over is made is to take only a life interest in his part, which is to be divided among the survivors. If there is any case which has ascribed to the circumstance of a devise over for life the effect here contended for, I beg leave to doubt the soundness of the decision. *The case of Roe d. Sheers* v. *Jeffery certainly gives no countenance to that doctrine,* as the devise over was *only* of life estates, and on that ground Lord Kenyon compared it to Pells *v.* Brown. (*r*) So,

Sir W. Grant's statement of the general rule.

(*o*) *Ante* p. *498.

8. In Maryland a limitation over of land to a devisee for life, after an indefinite failure of issue of a prior devisee, does not convert the indefinite into a definite failure of issue, Watkins *v.* Sears, 3 Gill 492.

(*p*) 17 Ves. 479. See also Doe d. Jones *v.* Owens, 1 B. & Ad. 318; [In re Rye's Settlement, 10 Hare 111; Peyton *v.* Lambert, 8 Ir. Com. Law Rep. 485.]

(*q*) 2 Atk. 308.

(*r*) Cro. Jac. 590.

in Trafford *v.* Boehm the ground was that *all* the estates were for lives, and for lives only."

*In two more modern cases the circumstance of the property being in the devise over charged with sums of money, to be disposed of by the will of the first devisee, (though not made payable within a definite period after his death as in Nichols *v.* Hooper,) (*s*) seems to have formed the principal ground for holding the words under consideration to import a dying without issue at the death.

Property devised over charged with legacies,

Thus, in Doe d. Smith *v.* Webber, (*t*) a testator devised and bequeathed real and personal estate to his niece H., her heirs, executors, administrators and assigns forever, and provided that in case she should happen to die and leave no child or children, then he devised unto his niece B. his freehold lands called W., to her and her heirs forever, *paying £1000 unto the executor or executors of his said niece H., or to such person as she by her last will and testament should direct.* It was held that H. took an estate in fee, subject to an executory devise on her leaving no issue *at her death.* Lord Ellenborough disclaimed any stress on the word "children" as distinguished from *issue*, as, where the intent required it, it had been held to include all descendants, mediate and immediate; (*u*) and the present case, he observed, called for such a construction; otherwise, in the event of H. dying without leaving any child surviving her, but leaving grandchildren, B., the devisee over, would take in exclusion of such grandchildren, (*x*) which would be contrary to the manifest intention of the testatrix. But the circumstance upon which he mainly relied was, that of the £1000 being payable to the executors or nominee of H. in the event of her leaving no issue, which he said was equally strong with the circumstance in Roe *v.* Jeffery of the devises over being for life only, it being a personal provision, and to be made to a person or persons to be appointed by H. in her will. The event contemplated by the testatrix seemed to have been a proximate, and not a remote event, namely, a failure of issue at H.'s death,

—to be paid to the executors, &c., of the prior devisee.

(*s*) *Ante* p. *510.

(*t*) 1 B. & Ald. 713; [and see Chamberlayne *v.* Chamberlayne, 6 Ell. & Bl. 625, 633.]

(*u*) See *ante* pp. *101, [*405.]

(*x*) As "grandchildren" they took nothing. His lordship must here be understood as referring to the possible benefit they might take by gift or descent from their ancestor, and which is considered to be in the testator's contemplation in making the devisee's estate indefeasible on his leaving such objects.

and not an indefinite failure of issue which might happen at any remote period. Lord Ellenborough also observed that as two tenements *only* were given over on that event, that was an additional reason to show that the devise over could not be considered as converting the *prior devise into an estate tail; as that would make the same words of devise operate to give two different estates, an estate tail in part, and an estate in fee in the residue. (y)

So, in Doe d. King v. Frost, (z) where a testator devised to his son W. and his heirs certain real estate, and after giving to his wife an annuity thereout, to be paid by W., provided that, if W. should have no children, child or issue, the estate was, *on the decease of W.* to become the property of the heir-at-law, *subject to such legacies as he (W.) might leave by will to any of the younger branches of the family;* it was held that W. took an estate in fee, with an executory devise over, in the event of his dying leaving no issue at his death, to such person as should be then and in that event heir-at-law; Abbott, C. J., observing that it was the plain intention of the testator that, at the period of the decease of his son W., it should be ascertained whether the estates devised to him by the will should then vest in him in fee absolutely, or pass over to some other person, subject to any such legacies as the son might by his will devise to any of the younger branches of the family.

Words "on the decease of W."

Effect of charge of legacies to be bequeathed by prior devisee.

In this case Holroyd, J., adverted to the words "*on* the decease of the said W.;" but in the earlier case of Walter v. Drew, (a) where the devise was that if W. (the testator's eldest son) should happen to die and leave no issue of his body lawfully begotten, that then, in that case, and not otherwise, *after the death* (b) of W., the testator gave and bequeathed all his lands of inheritance to R., to have and to hold the same after the death of

Words *on* or *after* the decease.

(y) [See, however, Coltsmann v. Coltsmann, *post* p. *521.] An observation somewhat similar was made in Goodright v. Dunham, Doug. 251; but the obvious answer is, that the construction turned not on the first words limiting the property to the devisee and his heirs, (which were common to *both* devises,) but on the subsequent qualifying words, which applied to the two tenements *exclusively*. This remark (it will be perceived) does not affect the general grounds of the decision.

(z) 3 B. & Ald. 546. [And see Stratford v. Powell, 1 Ba. & Be. 1, noticed *post* p. *524.]

(a) Com. Rep. 373. [There was no direct devise to W., but he was heir-at-law, see vol. I., p. *556.]

(b) See this expression in regard to personalty, Pinbury v. Elkin, 1 P. W. 563, *post* p. 522, and other cases

W. to him and his heirs; Comyn, C. B., held it to be an estate tail in W. (c)

So, in Doe d. Cock v. Cooper (d) no notice was taken of a *similar expression, notwithstanding the stress laid on the words introducing the devise over as conferring an estate tail. [And in Jones v. Ryan, (e) where the devise was to A and his heirs forever, and in case A should die without lawful issue, the testator desired that *after* his (A's) death the property should go to B and her heirs, and in case A and B should both die without lawful issue, then to C and his heirs, and *after* his (C's) death without issue, to D and his heirs; Sir E. Sugden held that A took an estate tail. He laid some stress on the fact that B undoubtedly took an estate tail, and that it was not likely, from the frame of the will, that A and B were intended to have different estates: but it is evident that independently of this fact, he would have held that A was tenant in tail; observing that though the gift over was "after the death of A, yet it was after his death without issue."

Words "*after* his death" held not restrictive.

On the other hand, in Ex parte Davies, (f) where lands were devised to M. in fee, and in case M. should die without leaving any lawful issue of his body, the lands were *at his death* devised to C. and F. in fee, in equal shares; Sir R. Kindersley, V. C., said that no distinction could be made between "at" and "on," and decided on the authority of Doe v. Frost that M. took an estate in fee, with an executory devise over in case he left no issue living at his death.

Words "*at* his death" restrictive.

Again, in Parker v. Birks, (g) where a testator devised lands to his nephew A, his heirs and assigns forever; but in case A should die without child or children of his body lawfully begotten, he devised the same lands to the children of his niece B, their heirs and assigns forever *on the decease* of the said A; it was held by Sir W. P. Wood, V. C., that A took an estate in fee

Words "*on* his decease" held restrictive.

(c) As to estates tail by implication, see vol. I., p. *553, vol. II., p. *494.

(d) 1 East 229, *ante* p. *425. Where, as in this case, the prior devise confers an estate tail, it could hardly be contended that such words rendered the remainder over contingent on his leaving no issue at his death; as to which, see some observations *ante* p. *446; [still less that the gift over was not a remainder, but an executory devise; see remarks on Broadhurst v. Morris (2 B. & Ad. 1) made by Kindersley, V. C., 2 Sim. (N. S.) 122, and by Wood, V. C., 1 K. & J. 166; and see Wollen v. Andrewes, 2 Bing. 126 (life estates to survivors after informally *expressed* devise in tail.)

(e) 9 Ir. Eq. Rep. 249.

(f) 2 Sim. (N. S.) 114.

(g) 1 K. & J. 156.

simple subject to an executory devise over in case he died without issue (*h*) living at his death.[9]

Result of the cases as to "at," "on," "after."

The last two cases and Doe *v.* Frost were considered in Coltsmann *v.* Coltsmann (*i*) to have settled the rule of construction for cases in which the devise is to A in fee, and if he dies without issue, then, *at* or *on* his death, over. And the rule was applied in the case last mentioned, although the words used were "die without heirs of the body." But the words "after his death" are not quite so strong, (*k*) pointing less precisely to the moment of death.

"Upon her death" held on the context not restrictive.

*But of course the context may show that the recognized construction of *on* or *at* was not intended. Thus in Peyton *v.* Lambert, (*l*) where a testator devised lands to his sisters B. and M., as tenants in common in fee; and in case B. should die without issue, her share to go to her husband for life, and to descend immediately on his death to her sister M. and her issue; "and in case M. should happen to die without issue, *then* her half to descend *upon her death* to B. and her issue," and if she leave no issue, to her husband for life; and in case both the testator's sisters should die without issue, he devised the land to H. C. in fee. B.'s moiety alone was in question; but the limitation of M.'s moiety, "that in case M. should die without issue, *then* her half was to descend *upon her death* to B. and her issue," was referred to as giving the restricted construction to the words "die without issue" in that part of the will, and as affording an explanation of their import in the previous part relating to B.'s moiety. But the Court of Q. B. (Ir.) considering that there was a clear cross limitation of an estate tail to each sister of the moiety originally devised to the other sister, followed by a devise over of the entire estate to H. C. in fee in the event of both sisters "dying without issue;" and that if the original limitations to the sisters were read as conferring on them estates in fee simple, with executory devises over in the event of their dying without issue living at their respective deaths, the different moieties of the estate would (in the event of either cross limitation taking effect) be held by the same person for different estates, with power as to one moiety to bar the subsequent estates, and no such power as to the other moiety;

(*h*) Doe *v.* Webber, 1 B. & Ald. 713.]
9. Tinsley *v.* Jones, 13 Gratt. 289.
[(*i*) L. R., 3 H. L. 121, stated *post* p. *521. Cf. Dunk *v.* Fenner, 2 R. & My. 557.
(*k*) Per Wood, V. C., 1 K. & J. 165.
(*l*) 8 Ir. Com. Law Rep. 485.

and that other results might follow equally at variance with the testator's apparent intention; held that the sisters took estates tail in their respective moieties: and that although the expressions relied on had in some cases had the effect contended for, yet in the present case it was more likely the expressions were used to denote that the cross limitation to B. was to take effect immediately upon the failure of the estate which M. took under the preceding limitation, and not as intended to fix the death of M. as the period for ascertaining whether her estate should determine or become absolute.]

Distinction suggested, where prior devise is for life only.

It will be observed that in all the preceding cases [where the restricted construction was adopted] the prior limitation on *which the words under consideration were engrafted would, standing alone, have given the fee to the devisee. It is proper to notice this fact, as between such cases and those in which the preceding devise would confer a *life estate* only, some distinction, it is conceived, will be found to exist. Undoubtedly, the two cases are parallel in regard to the effect of words importing an indefinite failure of issue of the first taker, which, in both instances, create in him an estate tail; yet it is by no means clear that they concur as to the force of expressions or circumstances requisite to confine those words to a dying without issue at the death; since that construction is attended with very different degrees of convenience in the respective cases. Where the preceding devisee would take the fee, the convenience is all on the side of the restricted construction, which renders such fee defeasible on his not leaving issue at his death, and places the estate out of the power of the first taker, who might, if he were tenant in tail, (as he would be if the words were construed to mean an indefinite failure of issue,) defeat the ulterior estate. To prevent this consequence, the courts have generally, in such cases, lent a willing ear to the arguments in favor of the restricted (and which we have seen to be the popular) interpretation of these words. (*m*)

On the other hand, where the first devise would confer an estate for life only, the restricted construction imputes a very improbable inten-

(*m*) See accordingly per Wood, V. C., "In no case in which an estate in fee simple has been limited by the first words has that estate been reduced to an estate tail in order to construe the words of the gift over on the death of the devisee without issue to be a remainder. It is begging the question to say that the gift over is to be taken to be a remainder; because it is necessary first to make out that the gift in fee is cut down to an estate tail." Parker *v.* Birks, 1 K. & J. 166. Jones *v.* Ryan was not cited.]

tion to the testator; for, as it raises no estate tail in the first devisee, nor (it should seem) an implied estate by purchase in the issue, the land goes absolutely from the devisee at his death, whether he leave issue or not; and that event is material only as bearing on the right of the ulterior devisee; for, although the property ceases to belong to the prior devisee whether he leave issue surviving him or not, yet it is to pass over to the remainder-man only in case the prior devisee do *not* leave issue, which it is hard to suppose could have been really meant. And if the distinction suggested by these observations has not been a recognized principle of construction in any one of the cases, yet its influence may be traced in some of them.

Estate tail created, notwithstanding restrictive expressions.

*Thus, in Wyld *v.* Lewis, (*n*) where a testator devised to his wife E. without any words of limitation, and then proceeded to declare, that "if it shall happen that my said wife E. *shall have no son or daughter* (*o*) by me begotten on the body of the said E. *and for want of such issue*, then the said premises to return to my brother J., *if he shall be then living*, and his heirs forever, only paying to his two brothers (A and B) the sum of £150 *within one year after the decease of the said E.*; Lord Hardwicke held that E. took an estate tail; observing that the objection, that by the opposite construction the grandchildren would be excluded, was a strong argument for this.

But his lordship might have included in this observation the *children* of E., none of whom could have taken unless she had an estate tail.

Observations upon Wyld *v.* Lewis.

This case had two circumstances, either of which, according to the doctrine of the preceding cases, would have restrained the words to issue living at the death: 1st, That of the ulterior devisee being to take only if he should be then living, which would seem to bring it within the principle of Roe *v.* Jeffery, (*p*) (assuming that case to be rightly decided,) to say nothing of the argument which might be founded on the reasoning of the court in Pells *v.* Brown; (*q*) 2ndly, The charge imposed on the devisee over, which, it will be remembered, was the ground of the restricted construction in Nichols *v.* Hooper, (*r*) Doe *v.* Webber, (*s*) and Doe *v.*

(*n*) 1 Atk. 432, West's Cas. temp. Hardw. 311.

(*o*) "Son" and "daughter" seem to have been here used as words of limitation, as to which see *ante* p. *400.

(*p*) *Ante* p. *513; [and of Greenwood *v.* Verdon, *ante* p. *511.]

(*q*) See *ante* p. *508, n.

(*r*) *Ante* p. *510.

(*s*) *Ante* p. *515.

Frost; (*t*) and has greater force in Wyld *v.* Lewis than in the two latter cases, on account of the direction to pay within a definite period after the death. Lord Hardwicke, indeed, admitted that in general this was a very proper circumstance to induce that construction.

It is evident, therefore, that Wyld *v.* Lewis can only be reconciled with the line of decisions just referred to on the hypothesis before suggested; and hence we are conducted to the conclusion, that the cases in which a limitation over in default of issue, succeeding a gift to a person *and his heirs*, has been confined to a failure of issue at the death, do not necessarily apply to cases in which they are preceded by a gift expressly or constructively for life only. (*u*) [10]

(*t*) *Ante* p. *516.

[(*u*) See also Simmons *v.* Simmons, 8 Sim. 22; Butt *v.* Thomas, 11 Ex. 235, 1 H. & N. 109.]

10. The following limitations also have been referred to a definite failure of issue: "without any lawful heirs of their own," Abbott *v.* Essex Co., 18 How. (U. S.) 202; or "without a lawful heir or heirs," Jones *v.* Miller, 13 Ind. 337; Fahrney *v.* Holsinger, 65 Penna. St. 388; Berg *v.* Anderson, 72 Penna. St. 87; Timberlake *v.* Graves, 6 Munf. 174; or "without lawful heirs of his body," Hudson *v.* Wadsworth, 8 Conn. 359; Royall *v.* Eppes, 2 Munf. 479; or "without heirs or testament," Seibert *v.* Butz, 9 Watts 490; or "without children or their legal representatives," Bullock *v.* Seymour, 33 Conn. 290; or to A when he arrives at the age of twenty-one, and if he die without lawful issue, over, Sims *v.* Conger, 10 Geo. (Miss.) 231; or without lawful issue, to A, "to be paid after the death of said" first taker, Theol. Sem. *v.* Kellogg, 16 N. Y. 84; or "to be equally divided between B and C," Gresham *v.* Gresham, 6 Munf. 187; or "share and share alike," Woodley *v.* Findley, 9 Ala. 716; or "if my children should die without lawful issue, and thus I should have no lineal descendants," Du Bois *v.* Ray, 35 N. Y. 162; or on death under age or before marriage without issue, Jones *v.* Sothoron, 10 Gill & J. 187; Downing *v.* Wherrin, 19 N. H. 9; or if he "die unmarried and without lawful issue," to survivors, Rapp *v.* Rapp, 6 Penna. St. 49; or if he die unmarried and without issue, or marry "and then die without issue," to my children, Deihl *v.* King, 6 Serg. & R. 32; or on death without children, "to be divided equally among my grandchildren," Sherman *v.* Sherman, 3 Barb. 385; or on death "without lawful children," Matthes *v.* Hammond, 6 Rich. L. 399; or "without issue born alive of her body to heir her estate," Hall *v.* Chaffee, 14 N. H. 215; or on death "without leaving male issue," to testator's widow and child, and on the widow's death, over, Wilson *v.* Wilson, 32 Barb. 328; or without issue, leaving a wife or husband, Garland *v.* Watt, 4 Ired. L. 287. So to A and his heirs, if he have issue, but if he "die without having such issue," over, Waddell *v.* Rattew, 5 Rawle 231; so "without heirs of the body to live," Keating *v.* Reynolds, 1 Bay (S. C.) 80; or without issue before twenty-one, Adams *v.* Chaplin, 1 Hill Ch. (S. C.) 265. So in a limitation of personal property on death without issue, Hopkins *v.* Jones, 2 Penna. St. 69; Clark *v.* Baker, 3 Serg. & R. 477; Deihl *v.* King, 6 Id. 32; Smith's Appeal, 11 Harris (Pa.) 10; Still *v.* Spear, 3 Grant Cas. 304; Holmes *v.* Williams, 1 Root 332; or "after her death, if no lawful issue, to be divided amongst my children," Atwell *v.* Barney, Dudley (Ga.) 207; or if she "be dead without issue or

Gifts in fee and for life to A followed by one gift over of both "at death of A" held restrictive.

If A die without *heirs of his body*, then "at his death," held restrictive.

*[But if two estates be devised to A, one in fee simple and the other for life, and if he die without issue, then, in one and the same sentence, both estates be given over *at the death* of A, it would be difficult not to give these words in both cases the same meaning, however different their effect in the respective cases might be. Thus in Coltsmann *v.* Coltsmann (*x*) where by will a testator devised to his son J. C. his "*property*, lands and premises" at F., with the live and dead stock and the furniture; also his "lands and premises" at D.; and by codicil directed that if J. C. should die without heirs of his body, in that case and in default of such heirs the lands at F., with the furniture, and the lands at D., should *at his son's death* descend and be transferred to A and his heirs, charged with any provision made by J. C. for his wife with the testator's consent. Also if J. C. should die without heirs of his body, in that case and in default of such heirs the testator bequeathed £6000 to his daughter. It was held in D. P. that, as to the lands at F., which by the will were given to J. C. in fee, the limitation over was an executory devise to take effect in the event (which had happened) of J. C. dying without an heir of his body living at his death. Lord Cairns said that the words were clear and distinct, and pointed to a succession to J. C. which arose if at all at his death and at no other time: this construction was further recommended because the personalty would thus go over, as intended, with the realty; and because it was clear that by the bequest to the daughter a personal benefit to her was intended. Then, as to the lands at D. which by the will were given to J. C. for his life only, it was held that the words of limitation over being the same must be construed in the same way as in the case of the lands at F. (*i. e.*, as indicating a failure of heirs at the death of J. C.) although being applied to a different estate the effect would be different, namely to create a remainder. Whether the prior estate of J. C. was a life estate only, (as held by Lords Cairns and Cranworth,) or (as contended

afterwards die leaving no issue," Griswold *v.* Greer, 18 Ga. 545.

For other cases construed to refer to a definite failure of issue, see Brashear *v.* Macey, 3 J. J. Marsh. 91; Moore *v.* Howe, 4 Mon. 200; Simmonds *v.* Simmonds, 112 Mass. 157; Gibson *v.* Gibson, 4 Jones L. 425; Parish *v.* Ferris, 6 Ohio St. 563; Stevenson *v.* Evans, 10 Id. 307; Niles *v.* Gray, 12 Id. 320; Pennock's Estate, 33 Leg. Int. 290; Badger *v.* Hardin, 6 Rich. L. 149; Higginbotham *v.* Racker, 2 Call 265; Jones *v.* Jones, 20 Ga. 701; Forman *v.* Troup, 30 Id. 496.

[(*x*) L. R., 3 H. L. 121.

on the authority of Wyld *v.* Lewis and as held by Lord Chelmsford) was enlarged to an estate tail by the gift over (*y*) it was unnecessary to decide; since in either case J. C. had by his acts acquired the fee simple and defeated the remainder. (*z*)

In this case it was contended by A that the prior estate in the *lands at D. was enlarged by the gift over to a fee simple, so that the gift over was an executory devise and therefore unaffected by the acts of A. But this construction, though favored by some of the judges in the court below, (*a*) was rejected in D. P., Lord Cairns observing that whatever authority there might be for holding that a general devise to A, followed by a devise over if A died without heirs of his body, or without heirs of his body living at his death, (*b*) might be expanded into an estate tail, in order to provide for heirs of the body, he knew of no authority for expanding it into a fee simple.

Another case in which the words in question bear the restricted construction is where the limitation over is preceded by a power implying a gift in default of appointment to the issue of the donee living at his death. This exception was first established in bequests of personal estate, and the authorities which establish it will be noticed in the next section.] (*c*)

Prior gift to issue at death, implied from power.

III.—Our next inquiry is, what expressions or circumstances in the context will cut down the words under consideration to issue *living at the death*, in regard to *personal* estate.

What will restrict in regard to *personal* estate.

1. As to the *expressions* which have been held to have this effect.

Expressions held to be restrictive.

[A gift over on death under the age of twenty-one and without issue, is held to refer to death under that age and leaving no issue surviving. (*d*) This agrees with the rule respecting real estate. (*e*)

Death without issue coupled with another contingency.

(*y*) But as to this see vol. I., p. *555.

(*z*) For if the prior estate was an estate for life, the remainder was contingent. If the prior estate was enlarged to an estate tail, the remainder was said to be vested, as to which see above, pp. *446, *516, n. (*d*).

(*a*) 17 Ir. Com. Law Rep. (N. S.) 692, citing a suggestion made by the author, *ante* p. *272, which is discountenanced by the opinion of Lord Cairns.

(*b*) As to this see vol. I., p. *555.

(*c*) § 3, sub-s. 3.

(*d*) Martin *v.* Long, 2 Vern. 151; Pawlett *v.* Doggett, Id. 86; Bradshaw *v.* Skilbeck, 2 Bing. (N. S.) 182, the words in this case were ambiguous, but held eqivalent to the expression in the text; and see Balguy *v.* Hamilton, Mose. 186.

(*e*) *Ante* p. *505.]

The effect of the words "at," "on" and "after" death, applied to gifts over of personal estate, has been the subject of frequent discussion.]

"After his decease" held restrictive.

In Pinbury *v.* Elkin (*f*) a testator having made his wife executrix, and given her all his goods and chattels, provided that if she should die without issue by him (*g*) then *after her decease* (*h*) £80 should remain to his brother J. Lord Parker, C., held that the words imported a dying without issue at the death, for that a contrary construction would be repugnant to *the words "after (*i. e.*, *immediately* after) her decease," which would be carrying the payment beyond the day, and would, he said, be as absurd as to appoint the day of payment to be to-morrow, if it shall rain this day twelvemonth.[11]

"Immediately after the decease of A."

Sir W. Grant has (*i*) intimated a doubt whether the word "after" was properly construed *immediately after* in the last case. But, of course, there can be no difficulty (as this *dictum* impliedly admits) where such is the *expression*. Accordingly, in Stratton *v.* Payne (*k*) [it seems to have been thought] that in case of a bequest to A and the heirs of her body, and for want of such issue to the children of B *immediately after the decease of A*, the latter gift was good by reason of the words in italics; [but as it turned out that the words "after the decease of A" had been erased before execution of the will, and had been deliberately excluded from probate, the point did not arise.]

"After his decease" held restrictive.

Pinbury *v.* Elkin seems to have been followed in several instances. Thus, in Wilkinson *v.* South, (*l*) where a term of years was bequeathed to A and to the heirs of his body and to their heirs and assigns forever, (*m*) and, in default of such issue, then *after his decease* to B and his heirs; this was held to be an executory bequest to B in case of A dying without having issue *at his death*.

So, in Trotter *v.* Oswald, (*n*) where a testator gave the residue of his

(*f*) 1 P. W. 563, 2 Vern. 758, 766, Pre. Ch. 483.

(*g*) See *ante* p. *378.

(*h*) As to this expression applied to *devises*, see *ante* p. *516.

11. See Marshall *v.* Rives, 8 Rich. 85.

(*i*) See Donn *v.* Penny, 19 Ves. 548, 1 Mer. 22.

(*k*) 3 B. P. C. Toml. 99, cit. in Read *v.* Snell, 2 Atk. 647.

(*l*) 7 T. R. 555. [And see Gawler *v.* Cadby, Jac. 346, where the words were weaker, and as to which see ch. XLIV.]

(*m*) The circumstance of the limitation being in these special terms is not material. They amount simply to an absolute gift; see *post*.

(*n*) 1 Cox 317.

real and personal property to the use of B. during his life, and to the lawful heirs of his body after his demise; but in case of his dying without issue of his body, *after his decease* he gave all such residue to O.; the question was, whether the bequest over of the personalty was good. Sir Ll. Kenyon, M. R., said that, if the will had stopped at the bequest to B. and the lawful heirs of his body, it would clearly have given him the absolute property [in the personal estate], and so if it had rested at the words "if he die without issue;" but the important words follow, "after his decease I give," &c. These, he said, made it a contingency with a double aspect; if he had had a child at his death, then the limitation over would have been at an end; but, if not, it was within legal limits.

"After him" held not to be restrictive.

*But in Donn *v.* Penny (*o*) the words "after *him*" were held not to vary the construction. The devise was in the following words: "I give my dearly beloved wife all the real and personal estates for her life, and after her I give the same to my cousin R., all my real and personal estates to him and his male issue; for want of issue male *after him* I give the same to W. and his male issue; for want of issue male I give the same to W. and S., taking the name of D., and their male issue." R. having died without leaving issue, the personal estate was claimed by W. the next legatee; and it was contended for him that the words "after her" following the gift to the widow meant, immediately after her decease, and that the words "after him" in the gift in question might receive the same construction. But Sir W. Grant held that the expression was too ambiguous to divert the words of the devise from their legal construction. He considered the testator could not have had a different intention with respect to this legatee and the several legatees whose bequests were in the same words without this expression and who were postponed to him; and as already noticed, he questioned the soundness of Pinbury *v.* Elkin. (*p*)

Remarks upon the preceding cases.

The observations just quoted, and those which occur in Barlow *v.* Salter, (*q*) evince the extreme reluctance of this distinguished judge to permit words importing a failure of issue to be cut down by an equivocal context. That no judge of later times would have departed from the legal sense of the

(*o*) 19 Ves. 545, 1 Mer. 20, with which compare Porter *v.* Bradley, 3 T. R. 143, *ante* p. *509.

(*p*) *Ante* p. *522.

(*q*) 17 Ves. 483; *ante* p. *514.

words upon such an expression as that in Pinbury *v.* Elkin, admits of little doubt; but with great deference it is submitted that, followed as that case has since been, and particularly in Trotter *v.* Oswald, and Wilkinson *v.* South, (neither of which was cited in Donn *v.* Penny,) it is too late to question its authority. We are taught, however, by Sir W. Grant's decision in Donn *v.* Penny, that the doctrine of Pinbury *v.* Elkin will not be applied to any case in which the variation of phrase is such as fairly to take it out of the reach of its authority.

Words "at his decease" restrictive.

Where the words are "*immediately* after" or "at the decease" of the first taker, the applicability of the doctrine of Pinbury *v.* Elkin seems to be still more conclusive on account of the greater definiteness of the expression. [Thus, in Stratford *v.* Powell (*r*) where personalty was bequeathed to the testator's wife abso*lutely, "and after failure of issue *at and on* the decease of my wife," then over. Lord Manners held, that the gift over was good as referring to failure of issue at death.] So, in Rackstraw *v.* Vile, (*s*) where a testator having by his will given his son one-fourth share in his personal estate, by a codicil declared that his son's share should be only for the natural life of himself and his wife, *provided they had no issue, and at their death* should become a part of the residue. Sir J. Leach, V. C., held that the failure of issue was plainly confined to the death of the survivor, by the direction that the share was to become part of the residue at their death.

"At their death" held restrictive.

Word "then" as interposed between two limitations.

Of course the word "then," as commonly interposed between two limitations, has no effect in restricting words importing a failure of issue to issue living at the death. Used in this way, "then" is a particle of inference, connecting the consequence with the premises, and meaning "in that event," or "if that happens."[12] It is, therefore, a word of reasoning rather than of time. (*t*)

[(*r*) 1 Ba. & Be. 1; and see same construction applied to *devises, ante* p. *517.]

(*s*) 1 S. & St. 604.

12. This is also the prevailing construction in the United States, Matthews *v.* Daniel, 1 Murphy 42; Bryson *v.* David-

(*t*) Per Lord Brougham, in Campbell *v.* Harding, 2 R. & My. 411. See also Stanley *v.* Lennard, 1 Ed. 87, *ante;* Beauclerk *v.* Dormer, 2 Atk. 308; [Gill *v.* Barrett, 29 Beav. 372.] The above-quoted passage in Lord Brougham's judgment was cited with commendation by Sir K. Bruce, in Pye *v.* Linwood, 6 Jur. 619, where an attempt was again made, and with no better success, to found an argument for the restrictive construction on the word "then."

III.—2. Another ground upon which the words in question have received a restricted construction is, that the bequest over involves a *personal* trust and confidence. To this principle Mr. Fearne (*u*) refers the case of Keily *v.* Fowler, (*x*)

Bequest over involving a personal trust.

son, Id. 143; Chism *v.* Williams, 29 Mo. 288; Porter *v.* Ross, 2 Jones Eq. 196; Clifton *v.* Haig, 4 Desaus. 330. But see Timberlake *v.* Graves, 6 Munf. 174.

It was said by Napton, J.: "The question is, conceding that the words 'dying without issue' mean an indefinite failure of issue, are there *other words which, of themselves and in despite of this general manifestation of intention* to keep the property indefinitely in the descendants of the first taker, point incontestably and unequivocally to the death of the first taker as the period contemplated by the testator when the limitation over should take effect. What those words must be, or, at all events, what must be their unequivocal import, is almost as well settled by the precedents as the rule itself. * * * It is not necessary for us to review the cases, it is sufficient to say that we have found no case which would warrant the conclusion that the particular phraseology of the will before us would overrule the general import of the words 'dying without issue.'" Chism *v.* Williams, 29 Mo. 288, 298. The phraseology in this will was "then and in that case."

Again, in a case where the provision of the will was, "In case the said A. E. E. *should die without issue of her body lawfully begotten*, then and in that case I give," &c., it was said by Alvey, J.: "It was with a view of restricting the words *die without issue*, and to make them import a dying without issue living at the death of the first taker, that so much stress was placed in argument upon the words *then and in that case*, following the words die without issue of her body lawfully begotten. It was insisted that the word *then*, taken as an adverb of time, has reference, not to the contingent event when issue might become extinct, but to the time of the death of the first taker. And there are cases where that form of expression, especially in regard to bequests of personalty, where slight circumstances are relied upon to support an executory bequest over, has been allowed some weight. But bearing in mind that this devise is to be read and construed now as it would or should have been read and construed at the date of the will, and that no subsequent events can operate to change that construction, the question is, was it not the real intention of the testatrix to devise the property to her granddaughter and her issue or posterity if any she should have; but if she should have none, or if her issue should become extinct, *no matter when*, that then the property should go over to the next devisee or his heirs. If this be the real intent and scope of the devise, the case is too plain for argument; and it is difficult, indeed impossible, to discover anything on the face of the will sufficient to countervail that construction. But in the case to which we have already made so much reference, that of Newton *vs.* Griffith, the words 'then, and in such case,' were there used in connection with the devise over to the daughters, and though there are more circumstances in that case than the present that looked to the meaning of a definite failure of issue, yet there was no stress laid upon those words whatever. It has been strongly urged, however, that because it does not appear that these words were deemed of importance in that case, and were not considered in deciding upon the validity of the devise over, or, in other words, because the decision is

(*u*) Fea. 482.

(*x*) 3 B. P. C. Toml. 299, Wilm. 298.

where a testator bequeathed his worldly substance unto his daughter, in case she married with consent; in case she married without consent, she was to have only twenty cows and a horse; and, after appointing executors, he provided that in case his daughter should die without issue, his substance should return back to his executor, to be distributed as he should therefore direct; and, lastly, *in case his said daughter should* marry without consent, or *die without issue, his substance should return back to his executors, to be by them distributed in manner following*, viz., to J. D. £100 and several other pecuniary legacies, and to his daughter twenty cows and a horse. It was held, that the bequest over was to take effect on the death of the daughter without issue living at the death.

Observations upon Keily v. Fowler.

This case, and the ground for it above suggested, were disap*proved of by Lord Thurlow in Bigge *v.* Bensley, (*y*) who observed, "that it would be better to say that in Keily *v.* Fowler there was no rule of construction than Mr. Fearne's." The fact probably was, that this very learned writer, finding the case so decided, put it upon the best ground he could discover. The ground, however, to which he has referred it does not exist; for the trust was not necessarily personal to the executors named, but might have been executed by the representatives of the survivor: and as it is clear that a transmissible *trust* raises no stronger argument against the ordinary construction than a transmissible *interest; e consequentia*, a personal trust (*i. e.*, exclusively personal) *does* raise as strong an ar-

silent in regard to them, they should be laid hold of in this case, in order to distinguish this from the case of Newton *vs.* Griffith. But we are not of that opinion. The case of Newton *vs.* Griffith has stood the test of a half century, and has become a landmark in the real property law of this state. How many valuable titles may have been acquired and are still held upon the authority of that case, it would be difficult to conjecture, though we may suppose them to be many. After this great length of time, and the repeated recognition of the authority of the case by the courts, any decision by this court, in the slightest manner questioning or qualifying the decision made in that case, might and probably would lead to the most pernicious consequences. Overrefinements and unsubstantial distinctions should be indulged in no class of cases; but above all others should such refinements and distinctions be excluded in cases involving the principles of real property law. Indeed, if this court were now to give to the words *then, and in that case* the force and effect for which the appellants contend should be allowed them we should virtually overrule Newton *vs.* Griffith:—an act the responsibility for which we are not willing to assume." Josetti *v.* McGregor, 49 Md. 202, 213.

(*y*) 1 B. C. C. 187. [The citation in the text is from Fea. C. R. 484, n. by Butler. Brown's report is different, and not very intelligible.]

gument as a personal interest. (z) The argument founded on the nature of the property given over to the daughter, namely, cows and horses, to which Mr. Fearne also alludes, appears to be not more conclusive.

Where the gift over is to *survivors*.

A limitation to the *survivor* of several [living] persons in default of issue of either [forms] another exception to the rule which construes these words to import an indefinite failure of issue; ["for it will be intended that the survivor was meant individually and personally to enjoy the legacy, and not merely to take a vested interest which might or might not be accompanied by actual possession." (a)

Presumption from the word that the restricted construction was intended.

Thus, in Hughes *v.* Sayer, (b) where a testator gave a share of his residuary personal estate to A and B, "and upon either of their dying without children, then to the survivor," it was held that the words "dying without children" (which were understood to be equivalent in that case to "dying without issue") must be taken to be children living at the death of the party, because if either of the legatees died leaving issue, it was not probable that the survivor would live to see a failure of issue, in the general sense.]

With this agrees Ranelagh *v.* Ranelagh, (c) where one of several grounds upon which words referring to the failure of the issue of certain pecuniary legatees were held not to import an indefinite failure of issue (so as to turn express life interests previously given to the legatees into absolute interests), was, that the ulterior gift which the word in question served to introduce was in favor of the "survivors" of the legatees; which *term, it was considered, meant according to its more obvious sense persons living, and was not used synonymously with *others*, so as to confer interests transmissible to the representatives of predeceased legatees. [And a similar decision was made in Westwood *v.* Southey. (d)

So, in Turner *v.* Frampton, (e) where the bequest was to A and B "if living at my death, but if either of them shall happen to die before me *or at any time after* without issue, then I give the share of him

(z) As to which, see *ante* pp. *513, *514.

[(a) Per Sir W. Grant, M. R., Massey *v.* Hudson, 2 Mer. 133.

(b) 1 P. W. 534.]

(c) 2 My. & K. 441.

[(d) 2 Sim. (N. S.) 192. See also per Lord Brougham, 2 R. & My. 405; Fisher *v.* Barry, 2 Hog. 153.

(e) 2 Coll. 331.

or her so dying and without issue to the survivor of them;" Sir J. K. Bruce, V. C., held that this meant failure of issue at death. (*f*)

Presumption repelled where the gift to "survivor" contains words of limitation.

But the presumption in favor of a limited construction of the words "in default of issue" arising from the use of the word "survivor" is repelled where words of limitation are superadded to that word. The addition excludes the presumption that it was a mere personal benefit that was intended for the survivor: for, though there should be no such failure of issue as would enable him personally to take, yet his representatives would be entitled to claim in his right whensoever the failure of issue should happen.[13] Sir W. Grant, M. R., who thus stated the rule in Massey *v.* Hudson, (*g*) acted upon it in that case, where words of limitation were superadded, and on the same occasion discovered that Nicholls *v.* Skinner, (*h*) with which, as reported, his decision appeared to clash, was in fact an additional authority in favor of it.

It is to be observed that the reasons given by the M. R. for the distinction allowed in cases where the representatives of the "survivor" are expressly mentioned seem to apply with equal force to every case where the survivor takes more than a life interest under the will, whether the representatives are mentioned or not. The cases, however, show that it is the fact that they are mentioned, rather than the effect produced, which creates the distinction; (*i*) since the restricted

"Survivor" not read "other" where it would make the gift over void.—(*f*) Where "survivors" means, as it sometimes does, "others," (*post* ch. XLVII.,) the gift over is clearly on an indefinite failure of issue, and void; and it was said by the judges who decided Westwood *v.* Southey and Turner *v.* Frampton, that in ambiguous cases (which they considered them to be) the law leaned in favor of that interpretation of "survivors" which would support the bequest over. Cf. Harris *v.* Davis, 1 Coll. 416, *post* § 4.]

13. Barksdale *v.* Gamage, 3 Rich. Eq. 271. In this case, at page 273, it was said by Dargan, Ch.: "In personal property, a limitation to the survivors of living persons has the effect of qualifying the generality of a gift to the first taker, and *his issue*, or *the heirs of his body*; so as to make the first taker have a life estate, and the issue, or heirs of the body, take as purchasers, by way of remainder. But where words of inheritance or succession are superadded to the limitation in favor of survivors, who are to take after a general failure of the issue of the first taker, such issue cannot take as purchasers. The ulterior limitation over in such a case, would, itself, fail for remoteness, and, therefore, cannot impart such a restrictive modification to the words, heirs of the body, or issue, as to make them mean *heirs of the body, or issue, living* at the death of the first taker."

[(*g*) 2 Mer. 134; see also O'Donohoe *v.* King, 8 Ir. Eq. Rep. 185.

(*h*) Pr. Ch. 528. The gift was to survivors and their heirs.

(*i*) See a somewhat analogous case,

construction has *prevailed in consequence of the use of the word "survivor" in many cases where such survivor has taken a transmissible interest.] (*k*)

So, if the ulterior bequest which is to take effect on the failure of issue be to persons who shall be living *at the time*, the same reasoning seems to apply; but, in order to let in the force of this argument, the ulterior bequest must be so framed as to be confined to persons living at the death of the testator, and must not embrace an indefinite range of unborn persons. (*l*) [When, however, it is once ascertained by the description of the ulterior legatees as living at the period of failure, that failure at the death of the party is meant, an alternative gift, to take effect if none of those legatees are then living, to others not so described, must also be valid.] (*m*)

Distinction where ulterior gift is to a person living at death of person whose issue is referred to.

And, of course, if the event which is made the condition precedent of the ulterior gift is not the fact of the legatee surviving the extinction of issue, but merely that of his surviving the person whose failure of issue is referred to, no ground is thereby laid for the restricted construction, as the ulterior gift might be intended to confer a *vested interest* on the death of such person, to take effect *in possession* in favor of the representatives of the legatee on the failure of issue at any remote period.

Thus, in Garratt *v.* Cockerell, (*n*) where a testator, after bequeathing his personal estate to his children, added, "should all my children die without *heirs*, my property in that case to be divided equally between the children of my brothers and sisters *alive at the death of my last child.*" The question was, whether the word "heirs" (which, it was admitted was synonymous with *issue*) imported an indefinite failure of issue, in which case the gift over was void for remoteness. Lord

Hodges *v.* Grant, L. R., 4 Eq. 140; and on the significance in gifts of personalty of the presence or absence of words of limitation, see Lonsdale *v.* Berchtoldt, Kay 646.

(*k*) Hughes *v.* Sayer, Turner *v.* Frampton, Westwood *v.* Southey, Greenwood *v.* Verdon, all stated *ante* pp. *511, *526.]

(*l*) See Campbell *v.* Harding, 2 R. & My. 390; [Webster *v.* Parr, 26 Beav. 236; see also Prior on Issue, p. 85. In Destouches *v.* Walker, 2 Ed. 261, a bequest, in case the prior legatee should die without issue, to such of the testatrix's "nearest relations as should at that time be living," was held to be void. But it was not argued that "relations" meant such as should answer the description at the testatrix's death; see *ante* p. *130.

(*m*) Jones *v.* Cullimore, 3 Jur. (N. S.) 404. See also Gee *v.* Liddell, L. R., 2 Eq. 341.

(*n*) 1 Y. & C. C. C. 494.

Langdale, M. R., and Sir K. Bruce, V. C., successively decided in the affirmative, being of opinion that the terms of the gift over did not (as contended) restrict the contingency to the failure of issue at the decease of the last child. "Can the words 'at the death of my *last child,' (said the V. C.) be applicable to the actual division of the property as well as to the period at which the collateral relatives intended to be benefited were to be ascertained? Are they sufficient, in a case of this kind, to show that he meant the selected collateral relatives to become entitled in possession 'at the death of his last child,' if at all? Do they, in short, furnish grounds solid enough to support the restrictive construction of the phrase 'die without heirs'? Here, as it seems to me, lies the difficulty of the case. It is true, as Sir W. Grant said, in Massey *v.* Hudson, (*o*) 'a bequest to A after the death of B does not import that A must himself live to receive the legacy. The interest vests at the death of the testator, and is transmissible to representatives, who will take whenever the event of B's death may happen. So, if the bequest be to A, in case B shall die without issue. If that were allowed to be a good bequest, A's representatives would be entitled to take at whatever time the issue might fail. It is for that reason that it is held too remote.'"

Prior (implied) gift to issue at the death.

III.—3. Another class of cases remaining to be noticed is, where the words importing a failure of issue are preceded by a power implying, in default of appointment, a gift to the issue of the donee living at his decease. In this situation the words in question are evidently referential, and, as such, may seem to belong to the preceding chapter, where indeed the cases have been briefly noticed; (*p*) but they suggest a few observations which will more properly find a place here.

The authorities for this exception to the indefinite construction are Target *v.* Gaunt (*q*) and Hockley *v.* Mawbey. (*r*) In Target *v.* Gaunt, a term of years was bequeathed to H. for life, and no longer; and, after his decease, *to such of the issue of H. as he should by will appoint, and in case H. should die without issue,* then over. The question was,

(*o*) 2 Mer. 130.

(*p*) *Ante* p. *449.

(*q*) 1 P. W. 432, 10 Mod. 402, Gilb. Eq. Cas. 149.

(*r*) 1 Ves., Jr., 143, 3 B. C. C. 82; [see also Leeming *v.* Sherratt, 2 Hare 14, stated p. *449; Keating *v.* Keating, Ll. & G. temp. Plunk. 291.] But see Simmons *v.* Simmons, 8 Sim. 22, *post* p. *532; and see Martin *v.* Swannell, 2 Beav. 249; Crozier *v.* Crozier, 2 Con. & L. 294, 3 D. & War. 373.

whether the bequest over was good; and Parker, L. C., decided in the affirmative, observing that it must be intended such issue as H. should, or at least might, appoint the term to, which must be intended *issue then living;* and that this construction should be the more *favored, in regard it supported the will, whereas the other (*i. e.*, that the testator meant whenever there was a failure of issue) destroyed it.

To such of the issue of H. as he should by will appoint.

In Hockley *v.* Mawbey a testator devised freehold and leasehold estates to A for life, and after her decease to his son *R. and his issue lawfully begotten or to be begotten, to be divided among them as he* (*R.*) *should think fit, and in case he should die without issue,* over. One question was, whether R. took an estate tail in the realty, and an absolute interest in the personalty, or a life interest only in both. Lord Thurlow was of opinion that he had only an estate *for life.* It was evident, he said, that the testator did not intend the property to go to the issue as heirs in tail; for he meant that they should take distributively, (*s*) and according to the proportions to be fixed by the son, and that it had often been decided, that where the gift was in that way, the parties must take as purchasers. After some further remarks, he intimated an opinion that the children took an interest independently of the power, which only authorized the son to fix the proportions, and not to choose whether they were to take at all: and that the objects, whosoever they were, *must be in existence during the life of the son.*

To R. and his issue, to be divided as he should think fit.

[So in Eastwood *v.* Avison, (*t*) where a testator devised land thus, "To S. son of my son W., and if he shall *die without issue* that property shall return to the E. family, but if he lives to have children he shall have power to make a will of it to his *children;*" it was held that the issue on failure of which the property was to return to the E. family meant the children to whom S. had power to leave it if he should have any; and that again meant children living at the time of his death, as it was to such children alone that he could leave the property by will: S. therefore had an estate for life only.

Similar construction of devise of land.

This exception to the indefinite construction prevails therefore in devises of real estate as well as in bequests of personalty.]

It will be observed that in the preceding cases there was no express gift to the issue, except as objects of the power. It is now clear, how-

(*s*) As to this, see *ante* p. *428.

[(*t*) L. R., 4 Ex. 141.]

ever, (though doubted in Target *v.* Gaunt,) that an implied gift would be raised in them in default of the exercise of the power; (*u*) and, if the power extended only to issue living at the death, the trust was likewise so confined, as were, *pari ratione*, the words referring to the failure of issue.

Observations upon Hockley *v.* Mawbey.

*But Hockley *v.* Mawbey has sometimes been cited (*x*) as if the power had embraced issue generally, subject only to the restriction on its exercise, imposed by the rule against perpetuities; but this supposition not only imputes to Lord Thurlow an inaccuracy of statement in regard to the limits of the rule, (which allows a term of twenty-one years, in addition to a life,) (*y*) but is entirely inconsistent with his restriction of the implied gift, and the words introducing the limitation over, to issue living at the death, for which there was no pretext, unless the power was confined to such issue: and the effect of the words in question, if not restricted, must inevitably have been to make the devisee tenant in tail, which is the conclusion against which all his lordship's reasoning is directed.

Without entering into a discussion of the doctrine, which, in such cases, restricts the word "issue" to objects living at the death, on the reasoning derived from the power, it is sufficient, for the present purpose, to show, that, where the term is so restricted, the words introducing the devise over on failure of issue receive the same construction. (*z*)

It may be remarked, however, that if, in Target *v.* Gaunt and Hockley *v.* Mawbey, there had been an *express* limitation to the issue in default of appointment, it seems that such *limitation* could not, by implication, have been confined to issue living at the death, because the power embraced such objects only. (*a*)

Principle of the early cases noticed.

The reader will have perceived, in this view of the cases regarding personal estate, how readily the courts from an early period laid hold of expressions of an ambiguous character in order to confine words denoting a failure of issue to a

(*u*) See Brown *v.* Higgs, 4 Ves. 708, 5 Id. 495, 8 Id. 561; and other cases cited *ante* vol. I., p. *551.

(*x*) See Sug. Pow. (8th ed.) 397.

(*y*) See vol. I., p. *252.

[(*z*) And compare Gee *v.* Corporation of Manchester, stated *ante* p. *512.]

(*a*) See Smith *v.* Death, 5 Mad. 371, *ante* vol. I., p. *552; [Seale *v.* Barter, 2 B. & P. 285; and per Wigram, V. C., Davidson *v.* Procter, 19 L. J., Ch. 396, 14 Jur. 32; Roddy *v.* Fitzgerald, 6 H. L. Cas. 823.] See also Jesson *v.* Wright, 2 Bli. 1, *ante* p. *365.

dying without issue at the death, and thereby avoid the giving to the first taker the absolute interest, to the exclusion of the legatee over. It is clear, that, in some of these cases, such an effect has been attributed to expressions which would not, at this day, if the question were *res integra*, be held to warrant a departure from the ordinary legal signification; and they were decided, too, at a time when it was not so well settled as it now is, that the restricted construction did involve a departure from that signification, as to personal estate. (*b*)

*It is not surprising, therefore, that some cases should have occurred in which the limited construction has prevailed, even where such slight grounds as these have been wanting; (*c*) but, as to which, it scarcely need be observed, that they possess no authority whatever.

And even where the restricted construction is apparently well sustained by the early authorities, the practitioner should act upon the doctrine with caution, seeing that, in some recent cases, the courts have evinced a disposition not to pay very strict regard to the distinctions (unsubstantial as they certainly are) presented by those authorities. This remark is forcibly suggested by the case of Simmons *v.* Simmons, (*d*) where the testator gave all his real and personal estate to a trustee, in trust for his daughter for her life for her separate use, adding, "*at her decease she shall be at liberty to will the same to her issue* as she may think fit; but in case of her *dying without issue*," the testator gave the property to his brother and sister for their lives, and in the event of his brother's death prior to the death of his daughter, then to the children of his brother. It was contended, on the authority of Roe *v.* Jeffery and Target *v.* Gaunt, that the gift over was to take effect in the event of the daughter dying without leaving issue living at her death, *i. e.*, issue to whom she might "will" the property; but Sir L. Shadwell, V. C., held that the daughter took an estate tail in the lands of inheritance, and the absolute interest in the personalty.

It does not appear whether the V. C. by this decision meant to deny the authority or the applicability of the cited cases. [Their authority was recognized in Eastwood *v.* Avison.] (*e*)

(*b*) The contrary was maintained in most of the cases on the subject in Peere Williams, and the circumstance upon which reliance is now placed, as taking the case out of the rule, was merely thrown in as an auxiliary argument in favor of the limited construction.

(*c*) Chamberlain *v.* Jacob, Amb. 72. See also Donne *v.* Merrefield, cit. Cas. temp. Talb. 56. In Atkinson *v.* Hutchinson, 3 P. W. 258, cited in the same place, the material word *leaving* is omitted.

(*d*) 8 Sim. 22.

[(*e*) L. R., 4 Ex. 141.]

1 Vict., c. 26, § 29. Words importing a failure of issue, refer to failure at death

IV.—The rule of construction which has been the subject of discussion in the present chapter is abrogated in regard to wills made or republished since the year 1837 by the act 1 Vict., c. 26, § 29, of which, we have seen, (*f*) provides that words which may import a want or failure of issue of a person in his lifetime or at his death, or an indefinite failure of issue, [which includes such words as "die without having a son,"] (*g*) shall be construed to *import a want or failure of issue in the lifetime or at the death; (*h*)[14] but on this enactment are engrafted an exception and proviso, which exclude the operation of the statute, in cases where the words in question are simply referential to the objects of a subsisting estate tail, or a prior gift. The result, then, of the new doctrine, appears to be, that the words denoting a failure of issue refer to a failure at the death in every case, unless one of two points can be established:—first, that the words are referential to the objects of a prior estate or a preceding gift; or, secondly, that they are so clearly and explicitly used to denote a failure of issue at any time as to exclude the statutory rule of construction, which, it will be observed, only obtains where there is an ambiguity, *i. e.*, where the words *may* import *either* a failure of issue in the lifetime or at the death, *or* an indefinite failure of issue. If, therefore, a testator by a will made or republished since 1837, devise real estate to A, or to A and his heirs, and if A shall die and his issue shall fail *at any time*, then to B, A will take an estate tail, as he formerly would have done without these special amplifying words,

—except in two cases.

(*f*) *Ante* p. *493.

[(*g*) Being "words of precisely the same import," see 1 Ch. D. 410.

(*h*) See In re O'Bierne, 1 Jo. & Lat. 352, in which an attempt seems to have been made to argue that the very words "should he die without issue" indicated "the contrary intention." See also per Hall, V. C., Meredith *v.* Treffry, 12 Ch. D. 172, and *qu.*]

14. By statute of many states, words of limitation on failure of issue are made to refer to a definite failure at the death of the first taker: Alabama (Code 1876, § 2181); California (1855); Georgia (Code 1873, § 2249; Worrill *v.* Wright, 25 Ga. 659); Kentucky (Rev. Stats. 1877, p. 586); Maryland (1862); Michigan (Comp. L. 1871, p. 1327); Minnesota (Stats. at Large 1873, p. 613); Mississippi (Laws 1857, p. 307; Powell *v.* Brandon, 24 Miss. 343; Kirby *v.* Calhoun, 8 Sm. & M. 462); Missouri (Wagn. Stats. 1872, ch. 140, § 5; Faust *v.* Birner, 30 Mo. 414); New Jersey (1851, Rev. Stats. 1877, p. 1248, § 25; Condict *v.* King, 2 Beas. 375); New York (2 Rev. Stats., pt. II., ch. 1, § 22); North Carolina (1827, Bat. Rev., ch. 42, § 3); South Carolina (1853, Rev. Stats. 1873, ch. 86, § 10); Tennessee (Code 1858, § 2009); Virginia (Code 1873, ch. 112, § 10.)

which exclude, beyond all question, the application of the enacted doctrine.

Act does not apply to "dying without heirs of body."

[Nor does the act apply to the words "die without *heirs of the body*," for there is no ambiguity in them. Thus, in Harris *v.* Davis, (*i*) where freeholds and leaseholds were given to be divided between several persons or (read "and") their lawful heirs, and in case of there being no heir, (read "heir of the body,") (*k*) then the share or shares to be divided in equal parts among the *surviving* legatees. One of the devisees having died, a bachelor, in the testator's lifetime, it was held by Sir J. K. Bruce, V. C., that as to the freeholds the gift over of the deceased's share took effect: but that his share of the leaseholds lapsed. The V. C. said he had doubted whether it might not be possible by means of the word "surviving," or from the joint operation of § 29 of the wills act and the doctrine of Forth *v.* Chapman, to hold that there was no lapse. But upon consideration, he thought that such a construction of the will could not be maintained. It seemed to him that the words "there being no heir" must be held to point to an indefinite failure of issue, and that this was one of the cases in which "surviving" must be read *"other." (*l*) The distinction between "die without issue," or similarly ambiguous expressions, and die without "heirs of the body," was more plainly recognized by Sir W. James, L. J., in Dawson *v.* Small. (*m*)

Whether words "having a prior estate tail," &c., apply to personalty.

It has been doubted whether the exception depending on "such person having a prior estate tail," &c., applies to a gift of personalty, or is to be confined to a devise of real estate, in which alone properly speaking there can be an estate tail. "The legislature," said Lord Campbell, (*n*) "may have loosely applied these words to personalty, or may have had reasons for intending a distinction between realty, in which there may be an estate tail, to be cut off by a disentailing deed, and personalty not attended by such incidents." Harris *v.* Davis however did not turn on that: and in Green *v.* Green, (*o*) where freehold and leasehold property was given to A and the heirs of his body, and "in case of failure of issue," over; it was held by Sir J. K. Bruce, V. C., that although strictly speaking there could not be a bequest of personalty

[(*i*) 1 Coll. 416.
(*k*) As to this see *ante* p. *330.
(*l*) But see *ante* p. *527, note (*f*).
(*m*) L. R., 9 Ch. 651.
(*n*) Greenway *v.* Greenway, 2 D., F. & J. 137.
(*o*) Green *v.* Green, 3 De G. & S. 480.

in tail, yet, looking to the words of § 29, A was entitled to the leaseholds absolutely.

Act does not apply where "die without issue" would not previously have been taken indefinitely.

Again, the act does not apply where the words importing a failure of issue would, under the old law, have been construed not to refer to an indefinite failure of issue. Thus, in Morris *v.* Morris, (*p*) where by will made in 1839 the devise was to A, and if he should die without issue or before he should attain the age of twenty-one years, then over, it was contended that "or" was not to be read "and," and that consequently, though A had attained twenty-one, yet the gift over would take effect if he died without leaving issue at his death; but Sir J. Romilly, M. R., held that "or" must be read "and," as it would have been before the act, and that A having attained twenty-one took an indefeasible estate in fee. He said that § 29 had no application where the words "die without issue" were coupled with other words which had been the subject of authority and decision, such as "dying under twenty-one," nor did it in such cases alter such a gift, so as to make it determinable upon a dying without issue living at death *or* under twenty-one. (*q*)

So in Jarman *v.* Vye, (*r*) Sir W. P. Wood, V. C., held that, inasmuch as it was decided before the act by Crowder *v.* Stone *that a limitation over on the death of A without issue before some collateral event (as before the death of B) meant death and a failure of issue both happening in the life of B, such a limitation, not being susceptible of the alternative constructions mentioned in the act, was not affected by it.]

Cases in which ground is afforded by the context for excluding the operation of the statute will, probably, be of rare occurrence; for, as the legal and the popular signification will now coincide, it cannot be supposed that the context of the will will often furnish grounds for negativing the restrictive interpretation; and, for the same reason, there will be less anxiety on the part of the judicial expounders of wills than formerly to discover grounds for departing from the general rule—an anxiety which contributed not a little to encumber that rule with its numerous distinctions and exceptions. Where, however, the context does require that the words should be read as importing a general failure of issue, this construction must be attended with the

(*p*) 17 Beav. 198.

(*q*) See cases on this subject, *ante* vol. I., p. *505.

(*r*) L. R., 2 Eq. 784, *ante* p. *508.]

same consequence as under wills not within the statute, whether that consequence be the raising of an estate tail by implication in the person whose issue is referred to, as in the case already suggested, or the invalidating of the gift over, which is dependent on the failure of issue. Hence, it is not strictly true (as some have supposed) that the recent act absolutely excludes the implication of an estate tail from the words denoting a failure of issue; it merely requires that the construction on which such implication is grounded be sustained by *other* expressions found in the will; and, as we may confidently assume, for the reason already suggested, that such cases will be very infrequent, the act will eventually (though it may be not very speedily) reduce to insignificance the doctrine respecting the implication of estates tail from the words in question, as well as the numerous points of construction incidentally treated of in the present chapter.

*CHAPTER XLII.

WHAT WORDS RAISE CROSS-REMAINDERS BY IMPLICATION AMONG DEVISEES IN TAIL.

Words "in default of such Issue," &c., raise Cross-Remainders, when.—Alleged Exceptions;—where the Devise is to more than two;—where there is an express *Cross-Limitation; where the Devise in Tail is limited to the Devisees* respectively.—*Words "Remainder," "Reversion," raise Cross-Remainders, when. As to Executory Trusts.—General Conclusions.*

Introductory remarks.

Where lands are devised to several persons as tenants in common in tail, with remainder over, the question arises, whether, upon the determination of the entail in each share, such share devolves upon the other co-devisees in tail, or immediately goes over to the remainder-man of the entirety. Such reciprocal limitations to the tenants in common in tail, *inter se*, are, in professional language, denominated cross-remainders. It is settled that in wills, as distinguished from deeds, (*a*) they need not be limited expressly, (though in correctly-drawn wills they are never omitted,) but may be implied from the context. To show what expressions have been held, in judicial construction, sufficient to raise such implication, is the object of the present chapter.[1]

General principle of the cases.

The principle has been long admitted that wherever real estate is devised to several persons in tail as tenants in common, and it appears to be the testator's intention that not any part is to go over until the failure of the issue of all the

(*a*) Edwards *v.* Alliston, 4 Russ. 78. [Doe *v.* Birkhead, 4 Exch. 110. The latter case, though not impugning the principle stated in the text, overrules the former on another ground. And see Doe *v.* Wainwright, 5 T. R. 427; Doe *v.* Dowell, Id. 518. As to marriage articles, see *post* p. *548, n.]

1. As to cross-remainders by implication, see Allen *v.* Trustees, 102 Mass. 262; Dow *v.* Doyle, 103 Id. 489; Rodney *v.* Burtin, 4 Harring. 183; Kerr *v.* Vernor, 66 Penna. St. 326. See also 4 Kent 201; 2 Washb. on Real Prop. 516–18. Where, in a devise to two, their *several* shares are limited over to third persons, on the failure of issue of *either* of them, cross-remainders will not be implied, Baldrick *v.* White, 2 Bailey 442; Fenby *v.* Johnson, 21 Md. 106.

tenants in common, they take cross-remainders in tail among themselves. The great struggle has been to determine when the words *in default of such issue*, or other expression, used to connect the devise in tail with the succeeding limitation, may be construed to demonstrate such an intention. In order to place this subject fully before the reader, it will be convenient briefly to trace the steps by which the rule has been gradually placed on, or rather *restored to, its present enlarged and liberal footing; and then to state the general conclusions which the cases warrant.

What expressions raise cross-remainders.

One of the earliest leading authorities is an anonymous case in Dyer, (*b*) where a man, having five sons, and his wife *enceinte*, devised two-thirds of his lands to his four younger sons and the child *en ventre sa mere*, if it was a son, and to the heirs male of their bodies begotten, *and if they all five should happen to die without issue male of their bodies, or any of their bodies, lawfully begotten*, then the testator willed that the said two parts should revert to his right heirs. It was held, that four of the devisees having died without issue male, the survivor was entitled *to the whole;* it being evidently the true intent of the devisor, that, *so long as there was any issue male of his body*, (*qu.* of the bodies of any of the five devisees?) no part should revert to the heirs.

Devise over, if all the devisees died without issue;

So, in Holmes *v.* Meynell, (*c*) where a testator devised certain lands to his *two* daughters and their heirs, equally to be divided between them; *and in case they happen to die without issue*, then over; the daughters were held to be tenants in tail in common, *with cross-remainders in tail.* 2

—in case the devisees died without issue.

These early cases accurately represent the state of the law at this day; but it should be observed that at one period a notion appears to have obtained that cross-remainders could not be implied between more than two persons.

(*b*) 303 b, 13 Eliz., sometimes erroneously referred to as Clache's Case, as to which see below, p. *539.

(*c*) Raym. 452, 2 Show. 136.

2. In Lillibridge *v.* Adie, 1 Mason C. C. 224, cross-remainders were implied in a devise to A and B, their heirs and assigns forever, but "if they should die without issue," over; so Pierce *v.* Hakes, 23 Penna. St. 231; Hoxton *v.* Archer, 3 Gill & J. 199. So in Wall *v.* Maguire, 21 Penna. St. 248, where the devise was to A, C and B, with remainder to survivors, if B and C "leave no heirs." So in Turner *v.* Fowler, 10 Watts 325, in a devise to A, B and C, "neither to sell to any but he or she who is in possession of the remainder and at the decease of the last." So to A and B, with remainder to their issue, and remainder over on the death of the survivor, Seabrook *v.* Mikell, Cheves Eq. (S. C.) 80.

House to each, with devise if they all die, &c.

Thus, in Gilbert *v.* Witty, (*d*) a testator having three sons, and being seized of three houses, devised one of the houses to each son and his heirs, providing that *if all his said children should depart this life without issue of their bodies lawfully begotten*, then all his said messuages should remain and be to his wife and her heirs forever: it was held by Doddridge, Houghton and Chamberlain, JJ., (Lea, C. J., doubting,) that these words did *not* create cross-remainders between the sons, but that, on the death of any one of them without issue, his house should go over to his mother. Doddridge said that cross-remainders might be implied between two, but not in a devise *of several houses to three or more* persons, on account of the uncertainty and inconvenience.

Distinction between two and a larger number of devisees.

Here the objects were not devisees in common of undivided shares in the same land, but were respectively devisees of separate tenements; and it is also observable, that Lord Hale, in Cole *v.* Levingston, (*e*) in stating the inadmissibility of the implication *among more than two devisees, illustrated it by a similar species of case.

The alleged ground for the distinction between the favored number of two and a larger body of devisees seems to be altogether futile, (*f*) for it is obvious that the uncertainty and confusion would not be greater in the case of implied than in that of express remainders; and its origin can hardly be otherwise accounted for than by attributing it to the general indisposition of our courts in early times to adopt modes of construction which were considered (though, in this instance, erroneously) to have a tendency to create questions of a complex or subtle character. The doctrine, indeed, which rejected the implication between more than two devisees did not long (if *in effect* it ever did) exist, but, for a considerable period after it was virtually exploded, it was permitted to preserve a *semblance* of authority: for the judges, not venturing altogether to discard the distinction in regard to the number of devisees, said that the presumption was in favor of cross-remainders between two, but between more than two they were rather

(*d*) Cro. Jac. 655.

(*e*) 1 Vent. 224.

(*f*) Indeed, the implication of cross-remainders is *convenient*, as preventing the subdivision of shares. In one case, the rejection of the implication doctrine would have entitled the lessor of the plaintiff to recover twenty-five undivided three-hundred-and-sixtieth parts! [i. e., $\frac{25}{720}$,] Doe d. Gorges *v.* Webb, 1 Taunt. 234.

to be presumed against, though such presumption against them might be repelled by a plain indication of intention. (*g*)

Such was the language held upon this subject down to a late period. But an attentive consideration of the cases will show, that at this day at least there is no real difference with respect to the number of persons between whom cross-remainders can be implied. They will *not* be raised between two unless an intention to this effect can be collected; and, if such intention appear, they *will* be raised among a larger number.[3]

Not the least of the absurdities flowing from the distinction in question was the impossibility of applying it to a devise *to a class* of unascertained objects, who might consist of any number of persons *in esse* at the testator's death, or at some subsequent period; a difficulty which was noticed by Lord Eldon in Green *v.* Stephens. (*h*)

Whether *express* cross-limitation excludes implication.

*It was held in Clache's Case, (*i*) that cross-remainders could not be *implied* where there were *express* cross-limitations among the devisees in tail in certain events.[4] A testator devised a messuage to his daughter A and her heirs forever, and his principal messuage he gave to T. his youngest daughter and her heirs, *and if she died before the age of sixteen, A then living,* he willed that A should enjoy the principal messuage to her and her heirs forever; *and, if A should die having no issue, T. living,* then he willed that T. should enjoy the share of A to her and her heirs forever; *and if both his daughters should die having no issue,* then the testator devised *all* his said messuages over [to the two daughters of H. C.] T. died *having attained sixteen,* without issue, which raised the question whether cross-remainders could be implied between the daughters; and the court held that they could not; for the testator

(*g*) See Lord Hardwicke's judgment in Marryat *v.* Townly, 1 Ves. 104. Lord Mansfield's judgments in Doe d. Burden *v.* Burville, 2 East 48, n.; Pery *v.* White, Cowp. 780; and Phipard *v.* Mansfield, Id. 800; and Sir L. Kenyon's, in Staunton *v.* Peck, 2 Cox 8; Atherton *v.* Pye, 4 T. R. 713; Doe *v.* Cooper, 1 East 236; and Watson *v.* Foxon, 2 East 40.

3. See Hoxton *v.* Archer, 3 Gill & J. 199; Wall *v.* Maguire, 21 Penna. St. 248; Turner *v.* Fowler, 10 Watts 325; Hungerford *v.* Anderson, 4 Day 368; 2 Washb. on Real Prop. 517. In Hall *v.* Priest, 6 Gray 18, cross-remainders by implication were sustained among eight devisees.

(*h*) 17 Ves. 74.

(*i*) Dy. 330 b.

4. For express limitation of cross-remainders in tail, see Hawley *v.* Northampton, 8 Mass. 3; Parker *v.* Parker, 5 Metc. 134; Den *v.* Cook, 2 Halst. 41; Smith *v.* Post, 2 Edw. 523; Clark *v.* Baker, 3 Serg. & R. 470; Simpson *v.* Coon, 4 Id. 368; Baldrick *v.* White, 2 Bailey 442; Earle *v.* Hopkins, 1 Browne App. (Pa.) 55.

never intended that the principal house should go to A, unless T. had died within the age of sixteen years; and *no implication of cross-remainders could arise when an express and special gift and limitation was made by the devisor himself.* Dyer thought there was no entail, but a fee simple conditional: but the other three judges were of a contrary opinion.

The doctrine of Clache's Case was much canvassed in Vanderplank *v.* King, (*k*) in which Sir J. Wigram, V. C., decided, after much consideration, that the introduction of an express limitation of cross-remainders among *another* class of devisees in the same will did not repel the implication; observing, that an express gift of cross-remainders in one event did not preclude the court from giving cross-remainders by implication in another, where either case was clearly within the scope of all the reasoning upon which courts have proceeded in implying cross-remainders.

[Vanderplank *v.* King is clearly distinguishable from Clache's Case. The latter case was followed in Rabbeth *v.* Squire, (*l*) where a testator devised real and personal estate in trust to pay the rents of one-fifth part to each of his five sons and daughters for life, and after the death of each to his or her children whom he or she should leave at his or her death, in equal shares, (for life, as it was held,) but *if he or she should leave none,* then in trust for the other sons and daughters for their lives and the issue of *such as should be dead, as before directed, and when all his children should be dead the testator gave the whole property in trust for all the children of his five children equally in fee. A daughter of the testator died *leaving* a son, who died before the last survivor of the testator's five children. The share of the deceased daughter not being expressly disposed of in the interval after the death of her son, it was contended that cross-remainders to the other children of the testator and their children must be implied; but it was held otherwise by Sir J. Romilly, and on appeal by Lord Chelmsford, the testator having himself expressed the event in which such remainders should take effect in favor of those objects, viz., on the death of a child *without leaving* a child living at his or her death.

Again, in Atkinson *v.* Barton (*m*) the M. R. said the rule in Clache's

(*k*) 3 Hare 1. [See also Atkinson *v.* Holtby, 10 H. L. Cas. 313.

(*l*) 19 Beav. 77, 4 De G. & J. 406. As to implying cross-remainders among tenants for life, see *post* p. *554.

(*m*) 31 Beav. 277, 3 D., F. & J. 339. The decision of the L. JJ. was reversed in D. P., Atkinson *v.* Holtby, 10 H. L.

Case was that cross-remainders cannot be implied between objects where there are express cross-remainders between the same objects in different events; and he applied the rule to the case before him, refusing to imply cross-remainders between several stocks or branches of issue on the ground that there were express cross-remainders between the individuals of each stock or branch. But this was going beyond Clache's Case, and involved a denial of Vanderplank *v.* King, which in Rabbeth *v.* Squire the M. R. had clearly distinguished: and his decision was reversed by the L. JJ. K. Bruce and Turner.

Turner, L. J., on Clache's Case.

Sir G. Turner, indeed, went further: he denied that Clache's Case (*n*) had laid down the supposed rule, and he thus stated the result of the cases: "Cross-remainders are or are not to be im*plied according to the intention, and the circumstance of such remainder having been created between *the same parties* is a circumstance to be weighed in determining the intention, but is not decisive upon it." (*o*) Atkinson *v.* Barton, however, did not raise *this* point.

Implication not excluded by partial express limitation, on the context.

There is, perhaps, no great practical difference between the rule thus stated and the rule deduced from Clache's Case; for no rule of construction is decisive, the intention as shown by the context being in every case the ultimate test. Thus, in Coates *v.* Hart, (*p*) where a testator gave the income of

Cas. 313, on another ground; avoiding the particular question here discussed in the text.

(*n*) He said, that the decision in that case proceeded upon an express limitation over, (not stated above,) in case T. should die having no children, and not upon a cross-remainder having been before created in a different event, and that it decided "that a cross-remainder could not be implied against an express limitation." Now, the limitation here alluded to is contained in the following clause, which follows the statement in the text: "Provided always that if A. do marry I. H., then testator wills all her part to T. and to her heirs forever; provided also that if T. die having no children then he willeth *all the premises* to the said two daughters of H. C.," *i. e.*, if the first proviso took effect, whereby T. would get "all the premises," (both houses,) then both houses were to go over if she died having no children. But *A.* "*refused I. H. and took to husband G.*," so that (it is submitted) the L. J.'s "express limitation" did not come into operation. Hence, doubtless, its omission from the text, and (it may be added) from the statement of Clache's Case by Vaughan, C. J., Vaugh. 259.

To prevent a misconception which some of Sir G. Turner's remarks are calculated to produce, it should be added that Mr. Jarman was himself the author of the whole of vol. II. of "Powell on Devises," and that the *present* treatise was published by him twelve years before Rabbeth *v.* Squire was heard.

(*o*) See also per Wood, V. C., In re Clark's Trusts, 32 L. J., Ch. 525.

(*p*) 3 D., J. & S. 504.]

one-fourth of his residuary estate to each of four individuals for life, and if either of them should die *under twenty-one and without issue*, his share of income to go to the survivors for life; and from and after the death of either of the four leaving issue, the principal, to the income whereof their deceased parent had been entitled, was given to such issue; and the testator also gave to such issue the share of the principal to the income whereof their deceased parent *would have been entitled* if he had survived any other of the four who should afterwards *die without issue* (not repeating "and under twenty-one"); and if all the four should die without either of them leaving issue, the whole residue was given to other persons. One of the four attained twenty-one and died without ever having a child. It was held that her share of the income belonged to the others by implication for their lives. The clause immediately preceding the ultimate gift over, followed as it was by the gift over only in the event of all four dying without leaving issue, appeared to Sir G. Turner, L. J., to furnish a necessary inference that the survivors were to take during their lives the income of the share to the income of which any of the four dying without leaving issue had been entitled. Sir J. K. Bruce, L. J., thought the age which the deceased legatee attained was immaterial, and that whether she died before or after twenty-one the ulterior enjoyment of the income was intended to be the same.

Whichever way the rule is stated, the result in this case must on the context have been the same.]

It has been long settled, that, in regard to *executory trusts*, (q) an express direction to insert cross-remainders among another class of objects, or even an express cross-limitation among the *same* objects, does not exclude the implication.

In the case of executory trusts, express limitation not exclusive of implication.

*Thus, in Burnaby *v.* Griffin, (r) where a testatrix devised her real estate to trustees, upon trust to pay one moiety of the rents to her sister E. for life, and, after her decease, the testatrix directed the trustees to *convey* and *settle* the said moiety unto and upon the daughters of E. as tenants in common in tail general, "*with cross-remainders* for the benefit of such daughters," remainder to the younger sons of E. successively in tail male, remainder to the eldest son in tail general;

(q) As to such trusts, see *ante* p. *343.

(r) 3 Ves. 266, 268, 274. [*I. e.*, an express limitation to E. in default of C.'s issue, did not exclude an implied reciprocal limitation to C. in default of E.'s issue.]

and, as to the other moiety, upon trust for the testatrix's niece C. for life, "with the same limitations to her daughters and sons as to the children of E.;" and, if C. should depart this life without leaving any issue of her body living at her decease, the testatrix directed that *her sister E. should receive all the rents for life; and in case E. and C. should die without issue of their respective bodies, or all such issue should die without issue,* she then gave her real estate to four cousins. Lord Hardwicke decreed, that, in the settlement to be executed under this trust, cross-remainders were to be inserted not only between the children of E. and C. *inter se, but between the two families.*

Word "*respective*" held, at one period, to negative the implication.

Another ground upon which, at one period, it was held that the words "in default of such issue," following a devise to several persons in tail, did *not* create cross-remainders, was, that such devise was limited to the objects "*respectively;*" and it was even so determined where the devisees consisted of the favored number of two.

To R. and A. and the heirs of their *respective* bodies, and for default, &c.;

Thus, in Comber *v.* Hill, (*s*) where the devise was to the testator's grandson and granddaughter, R. and A., equally to be divided, and the heirs of their *respective* bodies, *and for default of such issue*, then over; it was held that there were no cross-remainders by implication; for it was said the mere words, "and for default of such issue," being relative to what went before, only meant "and for default of heirs of their *respective* bodies;" and then it was no more than if it had been a devise of one moiety to R. and the heirs of his body, and of the other moiety to A. and the heirs of her body, and for default of heirs of their respective bodies, then over; in which case there could be no doubt.

In Williams *v.* Brown, (*t*) the devise was in nearly similar words, and received the same construction.

—and the *several* and *respective* issues of their bodies, and for want, &c.

*Again, in Davenport *v.* Oldis, (*u*) where a testator devised to his son and daughter, to be equally divided between them, and the *several and respective* issues of their bodies, *and for want of such issue*, to his wife in fee; Lord Hardwicke held that there were not cross-remainders, which, not being favored by the law, could only be raised by an implication absolutely necessary; and that was not the case here, for the words, "*several and respective,*" effectually disjoined the title.

(*s*) 2 Stra. 969, Lee's Cas. temp. Hardw.

(*t*) 2 Stra. 996.

(*u*) 1 Atk. 579.

Lord Mansfield, too, on several occasions (though Lord Kenyon, in Watson *v.* Foxon, (*x*) treated his opinion as being the other way), recognized the distinction founded on the word "respective," particularly in the opinion certified by the court in Wright *v.* Holford, (*y*) and in its determination in Pery *v.* White. (*z*)

Doctrine in regard to the word *respective* overruled.

But the stress laid upon expressions of this nature has been disapproved of by the most distinguished modern judges, and the cases which were founded on the doctrine are now clearly overruled. (*a*)

It is observable, indeed, that both in Comber *v.* Hill and Davenport *v.* Oldis, the word "respective" was wholly inoperative upon the construction, since not only were there other expressions sufficient to create a tenancy in common, but the limitations in tail being to persons who could have no common heirs of their bodies, they of necessity took several, and not joint, estates of inheritance, without any words of severance. (*b*)

Before we proceed to consider the cases by which the distinction in question has been overruled, it will be proper to state two or three anterior leading authorities for the general position, that the words *in default of issue*, or *in default of such issue*, following a devise to several persons in tail, raise cross-remainders between them.

To daughters in tail, *and for default of such issue.*

Thus, in Wright *v.* Holford, (*c*) where the testatrix devised to her sons, and in default of such issue to all and every the daughter and daughters of herself and P., and to the heirs of their body and bodies, such daughters, if more than one, to take as tenants in common, and not as joint tenants; *and for default *of such issue*, to the use of her (testatrix's) right heir; Lord Mansfield and the other judges of B. R. on a case from chancery certified that, as there were no words intimating any intention to limit over the *respective* shares of the two daughters dying without issue, (*d*) and as nothing was given to the heir-at-law whilst any of the daughters or their issue continued, they must among themselves take cross-remainders.

(*x*) 2 East 42, *post* p. *545.

(*y*) Cowp. 34, *post*. See also Doe d. Burden *v.* Burville, 2 East 48, n., *post*; Phipard *v.* Mansfield, Cowp. 797, *post*.

(*z*) Cowp. 777, *post*.

(*a*) Atherton *v.* Pye, 4 T. R. 710, *post*; Watson *v.* Foxon, 2 East 36; Doe d. Gorges *v.* Webb, 1 Taunt. 238, *post*; Green *v.* Stephens, 17 Ves. 64, *post*. See also Staunton *v.* Peck, 2 Cox 8.

(*b*) See *ante* p. *252.

(*c*) Cowp. 31, 2 Ed. 239, *nom.* Wright *v.* Lord Cadogan; Amb. 468, *nom.* Wright *v.* Englefield.

(*d*) See *ante* p. *542.

Here the devise was to daughters as a class, a species of case of which Lord Eldon has observed, (*e*) that as, if there are no objects at the death of the testator, (and, if the devise be future, whether there are or not,) (*f*) the shares of subsequently existing objects are liable to be diminished by the birth of additional children, the consequence of not implying cross-remainders would be, that the shares of such after-born children, which had been so taken from the existing children, would, upon their death without issue, (perhaps the day after birth,) go *instanter* to the remainder-man, which could never be the intention. (*g*)

As to devises to *classes;*

In the next case, Phipard *v.* Mansfield, (*h*) we find the implication of cross-remainders applied in the case of a devise to *three* persons *nominatim.* The testator devised to his brothers W. and J. and his sister E. and the heirs of their bodies lawfully begotten and to be begotten, as tenants in common and not as joint tenants; *and for want of such issue,* to his own right heirs forever. On a question whether there were cross-remainders, Lord Mansfield, after stating the rule of presumption to be in favor of cross-remainders between two, and against them between more than two, (*i*) and reasoning at length upon the cases, and the terms of the will, decided in the affirmative. Want of issue (he said) meant issue of *all* of them. The rest of the court concurred.

—to three in tail, and "*in default of such issue;*"

In Atherton *v.* Pye (*k*) a testator devised (in remainder) to all and every the daughter and daughters of his daughter, and the heirs male of the body of such daughter or daughters, equally between them if more than one as tenants in common and not *as joint tenants; *and for and in default of such issue,* the testator gave and devised *all* his said premises unto his own right heirs forever. The daughter had four daughters. Lord Kenyon, though he adverted to the distinction between two and more, said, that there was no doubt, from the words of the limitation over,

—to a class (daughters) in tail, and "*in default of such issue;*"

(*e*) See judgment in Green *v.* Stephens, 17 Ves. 75.

(*f*) See *ante* p. *156.

(*g*) This is the substance, though not the precise terms, of his lordship's observations.

(*h*) Cowp. 797.

(*i*) It is certainly very extraordinary that his lordship should have continued to propound this doctrine, when in Comber *v.* Hill, (*ante* p. *542,) and Davenport *v.* Oldis, (*ante* p. *543,) the implication had been rejected between *two* devisees, on the mere force of the word "respective;" and when, with those cases before him, he was himself in this very case determining that [nearly] the same words *did* raise cross-remainders among three devisees.

(*k*) 4 T. R. 710.

that the devisor intended to raise cross-remainders between the grand-daughters. Buller, J., observed, that the devise was of *all* the devisor's estates, and they could not all go together, but by making cross-remainders.

In the next case of Watson *v.* Foxon, (*l*) the effect of the word "*respective*" came under consideration. The testator devised all that his farm, &c., situate at W. and H., to all and every the younger children of M. begotten or to be begotten; if more than one, equally to be divided between them, and to the heirs of their *respective* bodies, to hold as tenants in common; and if M. should have only one child, then to such only child and to the heirs of his or her body issuing; *and for default of such issue*, the testator gave *the said premises* to C. M. had four children. On the question whether cross-remainders could be implied, Lord Kenyon recurred to Lord Mansfield's statement of the rule of presumption, observing, however, that such presumption might be overruled by plain intention. He strongly disapproved of Lord Hardwicke's reasoning in Davenport *v.* Oldis (*m*) on the word "respective," which he characterized as unworthy of his great learning and ability. He observed, that in Atherton *v.* Pye (*n*) the devise over, "in default of such issue," was of all the testator's said lands, and stress was laid by some of the judges on the word *all* for raising cross-remainders, he would not say by implication, but by what the judges collected to be the intention of the testator. But the word *all* was not decisive of that case, and in truth made no difference in the sense; for a devise over of "the said premises," or "the premises," or "*all* the said premises," meant exactly the same thing. Admitting, therefore, the general rule, that the presumption was not in favor of cross-remainders by implication between more than two, still *that* was upon the supposition that nothing appeared to the contrary from the apparent intention of the testator. He had no doubt that the testator intended to give cross-remainders among the issue of M., and that all the estate should go over at the same *time. He thought that Lord Mansfield's quarrel with Davenport *v.* Oldis (*o*) was well founded, and he agreed with Wright *v.*

—to a class (children) "and the heirs of their *respective* bodies;" and for default of such issue.

Davenport *v.* Oldis, &c., overruled.

(*l*) 2 East 36. See also Staunton *v.* Peck, 2 Cox 8, where Lord Kenyon, then M. R., had made a similar decision in regard to the word "respective," but without the same explicit denial of the doctrine respecting it.

(*m*) *Ante* p. *543.

(*n*) *Ante* p. *544.

(*o*) But when did his lordship quarrel with it? See *ante* p. *543.

Holford and Phipard *v.* Mansfield, (*p*) from which he could not distinguish this case.

With Watson *v.* Foxon we take leave of all direct judicial recognition of the distinction as to implying cross-remainders between two and a larger number, which subsequent judges, except in one remarkable instance presently commented on, (*q*) have rejected in expression as well as in fact.

In the next case, Roe d. Wren *v.* Clayton, (*r*) cross-remainders were implied among several *branches* of issue, by the force of expressions referring to a preceding devise to daughters in tail, among whom cross-remainders were held to be implied.

Cross-remainders implied among several stocks of issue.

The testator devised all his real estate to his niece F. for life, remainder to her first and other sons in tail successively, and in default of such issue, to all and every the daughters of his niece and the heirs of their bodies, to take as tenants in common; *and, for default of such issue*, then to the issue of his sisters S., J., W. and B. in tail, *in such manner as he had limited the same to his said niece F.'s issue, and for default of such issue* to testator's right heirs. One question was, whether, supposing the several stocks of issue of S., J., W. and B. to take the estate in equal fourths *per stirpes*, (and not the whole *per capita*, as was also contended,) there were cross-remainders between such stocks. This rendered it necessary to consider whether cross-remainders would have been created between the daughters of the niece; though it was contended that, even admitting the implication in regard to *them*, it did not follow that the words, "in like manner," &c., should be construed to do more than raise cross-remainders between the issue of each sister *inter se*. Lord Ellenborough and the other judges thought the implication of cross-remainders among the daughters of the niece was perfectly clear, inasmuch as it was the plain intent of the testator that no part of his estate should go over to the issue of his sisters till default of issue of his niece; and they were further of opinion, that cross-remainders were to be implied among the several *classes* of the issue of the sisters, the testator's devise being tantamount to his saying, "I mean that all my estate shall be enjoyed by the issue of my four sisters, so long as there are any such, and, in default of such issue, all

(*p*) *Ante* pp. *543, *544.

(*q*) Livesey *v.* Harding, *post* p. *550.

(*r*) 6 East 628; [affirmed in D. P., 1 Dow 384, Sug. Prop. 283.]

to go together *to my own right heirs." Lord Ellenborough laid some stress upon the word *all*, used in the devise.

Devise to three in tail *respectively, and in default, &c.*; cross-remainders implied;

The next case, Doe d. Gorges *v.* Webb, (*s*) again elicited from the bar *both* the old arguments founded on the number of the devisees and the word "respective," and from the bench, a more distinct denial of their force and authority. A testatrix devised a moiety of certain lands to particular limitations, with remainder to her three daughters F., M. and A., and the heirs of their bodies *respectively*, as tenants in common; *and, in default of such issue*, she gave the same to her own right heirs; and it was held, that cross-remainders were raised between the daughters by implication. Sir J. Mansfield, C. J., adverting to the distinction between two and more, observed, that it was wonderful how it ever became established; and, in regard to the word "respective," he remarked, that it could make no difference; a devise to two as tenants in common, and the heirs of their bodies, must necessarily mean to the heirs of their *respective* bodies. (*t*) Lawrence, J., said, that the cases which *had founded themselves on the distinction of that expression must now be considered as overruled.*

—to B, C and D, and their *several and respective* heirs forever, and *in default of such issue*, over.

The implication doctrine was again discussed in Green *v.* Stephens, (*u*) where the testator (after certain limitations) devised to the use of all and every the daughter and daughters of his nephew A lawfully to be begotten, and to her and their heirs forever, as tenants in common; *and, for want of such issue*, to the use of his (the testator's) three nieces B, C and D, and their *several and respective* (the exact words which occurred in Davenport *v.* Oldis) (*x*) heirs forever, as tenants in common; *and for want of such issue*, to his own right heirs; and he bequeathed his personal estate to be invested in the purchase of land which he directed to be *conveyed* and *settled* to the same uses. The question was, whether a sum of money, which had not been laid out belonged wholly to the heir in tail of the surviving niece, (the other two nieces having died without issue,) or one-third only to him, and the other two-thirds to the devisee of the remainder-man; and this depended upon the question, whether the court, in executing the trust, would have inserted cross-remainders between the nieces. Lord Eldon, after

(*s*) 1 Taunt. 234.

(*t*) Assuming that they could not have common heirs of their bodies, as to which, *vide ante* p. *252.

(*u*) 12 Ves. 419, 17 Ves. 64.

(*x*) *Ante* p. *543.

referring to the authorities, and reprobating the distinctions which had been taken in some cases in regard to the expressions, "*all* the premises," "the *same," &c., decided in the affirmative. He said that, conceiving it to be the intention of the will before him to raise cross-remainders among the daughters of the nephew, (respecting whom he made some observations which have been before referred to,) (*y*) he could not think that the testator had not the same intention in regard to his nieces; there was nothing to distinguish them except the word "respective," which, upon the authority of Doe d. Gorges *v.* Webb, (*z*) did not make a distinction upon which judicial construction should turn.

Remarks upon Green *v.* Stephens.

As the implication of the cross-remainders in this case was so clear upon the direct devises, it was not necessary to found the decision on the circumstance of the trust being *executory*, though it is well known that the courts, in executing such trusts, are in the habit of dealing with them for this and other purposes with a freedom peculiar to, and derived from, the nature of such trusts. (*a*) Lord Eldon, however, chose to decide the case upon the construction of the anterior devises, in reference to which it seems to be open to some observation. Much of his reasoning, it will be perceived, proceeds upon the assumption that cross-remainders would have arisen by implication between the *daughters* of the testator's nephew; but it is submitted, with deference to such authority, that if the devise be accurately stated in the report, (of which there can be little doubt, as Lord Eldon twice refers to the devise in the very terms of it,) *the daughters would have taken estates as tenants* IN FEE SIMPLE, on which of course no remainders, either express or implied, could have been engrafted. The limitation was to the daughters as a *class* and their *heirs*, and, in default of *such* issue, over to the nieces *nominatim* and their heirs, and, in default of such issue, over. Now, the authorities have clearly established, that the words "such issue," in the limitation over after the limitation to the *daughters*, are referable to the *daughters*, (*b*) and not to their *heirs*, so as to give to the word "heirs" the sense of "heirs of the body;" but as to the *nieces*, who were to take as individuals named, *and who were not a class of "issue,"* the

(*y*) *Ante* p. *544.

(*z*) *Ante* p. *547.

(*a*) See Marryatt *v.* Townly, 1 Ves. 102, and other cases cit. 17 Ves. 67. As to the implication of cross-remainders in marriage articles, see Duke of Richmond's Case, 2 Coll. Jur. 347.

(*b*) See Hay *v.* Earl of Coventry, 3 T. R., and other cases cited, *ante* p. *455.

words "in default of such issue", necessarily referred to their *heirs*, and, consequently, reduced *their* estates to estates tail. The words "such issue" may be variously construed with reference to devises differently constituted. The case underwent consider*able discussion, but the difficulty of raising estates *tail* in the daughters (which was a necessary preliminary to the admission of cross-remainders) does not appear to have attracted the attention of either the bar or the bench.

The point is principally important (since no daughter of A appears ever to have come *in esse*) as it would have induced the necessity of construing the devise to the nieces, in regard to the implication of cross-remainders, *per se*, detached from the devise to the daughters; and, even in this point of view, it would not be material, if there was sufficient upon that devise alone (as it is conceived there was) to raise the implication; for the circumstance, that the words "in default of such issue" had already been operative to cut down the estate of the prior devisees to an estate tail, which is the only novel feature in the case, seems to form no valid reason for denying to them the additional effect of raising cross-remainders between those devisees. (*c*) We now return to the general subject.

Cross-remainders implied from words "for want of issue males," &c.

The next case of this class is Doe d. Southouse *v.* Jenkins, (*d*) where a testator, after the failure of some estates previously given, devised certain farms to his four grandsons (naming them), subject to certain annuities; adding, "they to have share and share all alike of all the aforesaid premises, and then I give to the heir male of all my said grandsons, and then to go to my grandsons' heirs male that part that belonged to their father, and then to them, and then to the last liver, to their heirs male of my said grandsons, *and for want of issue males of my grandsons*, I give," &c. One question was, whether cross-remainders among the four grandsons could be implied. It was contended, that the implication was here controlled by the testator's declaration, that he gave to the heirs male "that part which belonged to their father," by which it must be inferred that he meant to exclude the part that belonged to an uncle. The court, however, considered that the case fell within the general rule. Best, C. J., observed, that although the words "to them, and then to the last liver" were unintelligible, it was evident that the tes-

[(*c*) See also Forrest *v.* Whiteway, *post* p. *550; also Atkinson *v.* Holtby, 10 H. L. Cas. 313, where such words first enlarged life estates to estates tail, and then supplied cross-remainders between the tenants in tail.]

(*d*) 3 M. & Pay. 59, 5 Bing. 469.

tator meant that the estate should not go over to the ulterior devisee until the failure of issue of all the grandchildren, and therefore cross-remainders were to be implied.[5]

*So, in Livesey *v.* Harding, (*e*) where a testator, upon the failure of issue of his eldest or only son, limited his estate in the words following:—"To the use of all and every the daughter and daughters of me the said E. L., and the heirs of their bodies, to take as tenants in common if more than one equally; and if but one to the use of such only daughter of me the said E. L. and the heirs of her body forever; *and for default of such issue* to the use of my own right heirs forever." One question was, whether the daughters took cross-remainders in tail? Sir J. Leach, M. R., decided in the affirmative, on the ground that no part of the estate was to go over unless there were a failure of issue of all the testator's daughters. "Where," he said, "there is a gift to two persons only and the heirs of their bodies, cross-remainders will be implied, although there is no expressed intention that no part of the estate shall go over until the failure of issue of both, unless the limitation to them be successively, severally or respectively, and then the remainders over will be several and respective."

From words "and for default of such issue."

It could scarcely be meant that cross-remainders will arise between two devisees *without subsequent words*, (*f*)—a proposition which would have the effect of reviving the exploded distinction in regard to the number of the objects, and to found on it a construction untenable, it is submitted, both on principle and authority; for the argument in favor of the implication of cross-remainders among *any* number of devisees, rests wholly on the words introducing the devise over; and, if there is no such devise, the ground for the implication is wanting. No case can be adduced in

Remark upon Livesey *v.* Harding.

5. In Hungerford *v.* Anderson, 4 Day 368, in a devise to A, B and C in tail male, with remainder to survivors, if any "die without male issue," no cross-remainders were implied. In the words of Reeve, J., in this case, "in order to constitute a cross-remainder by necessary implication there must appear in the will an intention that no other person shall inherit any part of the estate or take it by way of remainder as long as any of the devisees, or any of their issue to whom it is given, are alive." To the same effect, see Picot *v.* Armistead, 2 Ired. Eq. 226, where a devise was to children, with remainder over if they die under age or without issue; so, too, Coffield *v.* Roberts, 13 Ired. L. 277; Evans *v.* Durant, 1 Strobh. Eq. 81. And see, as to remainders for life, Bulkley *v.* Bulkley, 1 Root 78.

(*e*) 1 R. & My. 636.

[(*f*) See Cooper *v.* Jones, 3 B. & Ald. 425.

which the doctrine here propounded (and extra-judicially, for the case suggested by Sir J. Leach was purely hypothetical) has been even contended for. Possibly the observations of the learned judge were misunderstood.

Estates in fee cut down to estates tail with cross-remainders.

[In Forrest *v.* Whiteway, (*g*) the devise was to two sisters, and their heirs and assigns forever; but, in case *both* should die without issue, then over. The Court of Exchequer held that the sisters took joint estates for life, with several inheritances in tail, with cross-remainders between them in tail.

Cross-remainders implied from gift over "in default of issue of *any* of them."

And in Powell *v.* Howells, (*h*) where one moiety of land was devised to A, B and C as tenants in common in tail, and, "in default of such issue *of any* of them," to X.; and the other *moiety was devised to D and E as tenants in common in tail, and, in default of such issue of both of them, to the said X.; cross-remainders of the first moiety were implied, notwithstanding the ambiguity of the words "any of them."]

General observations upon the cases.

Here closes the long line of cases establishing the operation of the words "in default of such issue," and other similar expressions, to raise cross-remainders among devisees in tail. It may seem to be extraordinary that so large an assemblage of decisions should have grown up in relation to a point which appeared to have been determined more than two centuries ago; (*i*) but the reluctance evinced by some of the judges of an early day to admit the implication between more devisees than *two*, the pertinacious retention, in terms at least, of the distinction in regard to that number, by several of their successors until a much later period, and more particularly the exception to the implication doctrine, founded on the words "several" and "respective," introduced by Comber *v.* Hill, Williams *v.* Brown and Davenport *v.* Oldis, (which was too absurd to be submitted to even with such reiterated adjudication in its favor,) are the sources from which the controversies have sprung that have rendered one of the simplest doctrines of testamentary construction in our books one of the most voluminous.

Lord Kenyon's attack upon Comber *v.* Hill and that line of cases in Watson *v.* Foxon was certainly bold, recognized as they had repeatedly been by his immediate predecessor; (*k*) but as his decision

(*g*) 3 Ex. 367; and see Stanhouse *v.* Gaskell, 17 Jur. 157.

(*h*) L. R., 3 Q. B. 654.]

(*i*) See Anon., Dyer 303 b, and Holmes *v.* Meynell, *ante* p. *537.

(*k*) See *ante* p. *545.

has been since, after much consideration, confirmed in Doe *v.* Webb (*l*) and Green *v.* Stephens, (*m*) we may confidently hope that the argument founded on the words "several" or "respective," or the exploded distinction in regard to the number of the devisees, (which is equally untenable upon principle and authority,) will never more be seriously advanced in a court of justice.

[Cross-remainders have also been implied where the gift over was on failure of issue at a particular period. Thus, in Maden *v.* Taylor, (*n*) where a testator devised freehold property in trust for his nieces A, B, C and D as tenants in common for life, and after the death of any of them, in trust as to her part for her children and the heirs of their bodies; and in case any of the *nieces* should die *without leaving issue living at her death*, then *for the survivors or survivor of the nieces and the heirs of her and their body and bodies; and in case all the nieces but one should die without leaving lawful issue, then for such only or surviving niece and the heirs of her body; and *in case of a total failure of issue of the nieces*, (which was held still to mean *at the death*,) then for testator's right heirs. Sir G. Jessel, M. R., said that the true rule was laid down in Doe *v.* Webb, (*n*) that you must ascertain whether the testator intended the whole estate to go over together. If you once found that to be intended, you were not to let a fraction of it descend to the heir-at-law in the meantime. You were to assume that what was to go over together, being the entire estate, was to remain subject to the prior limitations until the period when it was to go over arrived. He thought that principle applied to a case like that before him, where it was plain *in one event* the whole estate was to go over together, although it was possible that another event might happen in which that intention might be disappointed. He therefore held that cross-remainders must be implied between the children of each niece; otherwise, while the particular event was still in suspense, a fraction might, by the death of one child without issue, descend to the heir-at-law.]

Cross-remainders implied from gift over on failure of issue *at death*.

Cross-remainders have also been implied from the word "*remainder*."

Thus, in Doe d. Burden *v.* Burville, (*o*) where a testator (after limitations to his sons successively in tail) devised to the use of all and every his daughter and daughters as tenants in common and to the heirs of her and their body and

Devise to daughters in tail, *with remainder* over;

(*l*) *Ante* p. *547.
(*m*) Ib.
[(*n*) 45 L. J., Ch. 569.]
(*n*) *Ante* p. *547.
(*o*) 2 East 47, n., 13 Geo. III.

bodies, *with remainder* to the heirs of his (testator's) brother A forever:

cross-remainders implied.

Lord Mansfield was of opinion that cross-remainders were to be implied between the daughters. He observed that, in limiting the remainder to the singular number, the testator conceived that it could not take effect until the death of the last daughter without issue; and that, under the preceding limitations, all the female line of each son must fail before the male line of the other could take, and all must fail before the daughters could take. It would be absurd to suppose that he had a different intention as to his own daughter.

In another case, however, the same eminent judge held cross-remainders *not* to be raised by a limitation of "*the reversion*," after devises somewhat differently constituted.

Whether the word *reversion* will raise cross-remainders.

*Thus, in Pery *v.* White, (*p*) where the testafor devised (in remainder) to his four sisters and a niece for their lives as tenants in common, remainder to their sons successively in tail male, remainder to their daughters in tail, *the reversion* to his own right heirs: Lord Mansfield held that there were no cross-remainders. He relied much upon the devise being in effect to the sisters and niece and their sons *respectively*. "During their lives," he observed, "there is a division: each is to have a fifth for life, to enjoy in severalty. Then follows, 'the remainder to their sons successively in tail.' What is the meaning of the expression 'their sons'? It is impossible to construe it otherwise than 'respectively;' that is, remainder of the share of the sister dying to her sons successively; remainder to her daughters as coparceners, and then the *reversion* to the right heirs, that is, the reversion of the share of the several tenants for life and their issue *respectively*. It is absurd to say that the children of the other sisters should take the share of a deceased sister as purchasers in the lifetime of their mother."

Remarks upon Pery *v.* White.

He seems, therefore, to have thought, that if cross-remainders were raised, it must have been among *the children* only. His reasoning, it will be observed, proceeds upon the hypothesis now exploded, (*q*) that by a devise to persons *respectively* the implication is excluded, and not upon any distinction between the words "reversion" and "remainder," the expression in the last case, which must have been in his recollection, having been decided by him only three years before. It would certainly not be impossible to construct a plausible defence of such a distinction; but it is probable that the

(*p*) Cowp. 777; 18 Geo. III.

(*q*) *Ante* p. *547.

courts, instead of reconciling the two cases in this manner, would be inclined to go the length of saying that *any* words carrying on the limitations would raise cross-remainders between anterior devisees in tail. So far as Pery *v.* White rests upon the force of the word *respective*, [even if it had been actually in the will,] it is now clearly overruled. (*r*)

Allusion has been made to the more ready implication of cross-remainders in executory trusts (*s*) than in direct devises. It may be further remarked, in regard to such trusts, that in Horne *v.* Barton, (*t*) where a testator devised his real estate to trustees and their heirs, upon trust for the use and benefit of all and every his children who should live to attain the age of *twenty-one years or be married, which should first happen, in equal shares or proportions undivided, for their respective lives, with remainder to their issue severally and respectively in tail general, *with cross-remainders*, and the testator directed his trustees to execute a settlement accordingly; Sir W. Grant, M. R., held that cross-remainders were to be inserted, not only as between the children respectively, but also as between the families.

Executory trusts.

In a former work (*u*) the writer suggested the probability that the principles of construction upon which cross-remainders have been implied among devisees in tail would be held to apply to estates for life; and, consequently, that if a testator manifested an intention that property previously devised to several persons for life, as tenants in common, should not go over to the ulterior devisee until the decease of all the devisees for life, it would be concluded, by the same process of reasoning as had conducted to a similar conclusion in regard to devisees in tail, that the testator meant the surviving devisees or devisee for the time being to take the shares of deceased objects.[6] Such a devise afterwards occurred in Ashley *v.* Ashley, (*x*) where a testator devised real estate to the

Cross-remainders implied among devisees for life.

(*r*) *Ante* p. *547.

(*s*) *Ante* pp. *541, *548.

(*t*) Coop. 257, 19 Ves. 398. [But see same double implication in case of a direct devise, Roe *v.* Clayton, 6 East 628, *ante* p. *546.]

(*u*) 2 Powell on Dev. 623, n.

6. A cross-remainder for life in personal property was implied in Loring *v.* Coolidge, 99 Mass. 191. But not after an absolute gift of personal property, or a devise of real property in fee, Fenby *v.* Johnson, 21 Md. 106; Weyman *v.* Ringold, 1 Bradf. 46. But cross-remainders were implied after an absolute bequest of personalty, but if the legatees died "without leaving issue," over, in Cudworth *v.* Thompson, 3 Desaus. 256.

(*x*) 6 Sim. 358 [as to which see vol I., p. *282, n.] See also Pearce *v.* Edmeades,

use of his daughter A for her life, and after the determination of that estate, to the use of trustees to preserve, and after her decease, to the use of all and every the child or children lawfully begotten and to be begotten on the body of A, to take as tenants in common and not as joint tenants; *and for want of such issue* of A, then to the use of another daughter and her children in like manner. The master reported that the children of A took life estates only, without cross-remainders between them; but Sir L. Shadwell, V. C., expressed a strong opinion against the finding of the master. He observed that but one subject was given throughout; the expression "for want of such issue" meant want of issue whenever that event might happen, either by there being no children originally, or by the children ceasing to exist. Accordingly he declared that the children of A took estates for life as tenants in common, with cross-remainders between them for life.

The conclusions from the authorities on the subject are,[7]—

Conclusions from the cases.

1. That under a devise to several persons in tail, being tenants in common, with a limitation over for want or *in default of such issue*, cross-remainders are to be implied among the devisees in tail.

3 Y. & C. 246; [Walmsley *v.* Foxhall, 1 D., J. & S. 451, 605, as to the share of the child that died without issue.]

7. "1. If there is a devise of lands to two or more as tenants in common and the heirs of their bodies respectively, followed by a gift over in default of such issue, the gift over takes effect only in default of all such issue as would take under the antecedent limitations, and therefore cross-remainders are implied between the tenants in tail. Doe d. Gorges *v.* Webb, 1 Taunt. 234; Powell *v.* Howells, L. R., 3 Q. B. 655; Hannaford *v.* Hannaford, L. R., 7 Q. B. 116.

"And if the gift over is limited not expressly in default of issue, but as a remainder, the same result follows: Doe d. Burden *v.* Burville, 2 East 47 n.; and the word reversion would probably now be held to have the same force, notwithstanding Pery *v.* White, Cowp. 777.

"The arguments against the implication of cross-remainders, founded upon the number of the devisees, and such words as severally or respectively, or the fact that *the whole* is not expressly given over, must now be considered as exploded.

"2. The result will be the same if the gift over is in default of issue to take under the preceding limitations, living at the death of their parents. Maden *v.* Taylor, 45 L. J., Ch. 569.

"3. It has been said that if cross-remainders are provided between certain objects in certain events, the implication of cross-remainders between those objects in different events does not arise; so that, for instance, if cross-remainders are provided between the children of separate families among themselves, cross-remainders would not be implied between the children of one family and those of the other. Clache's Case (Dyer 330), however, which is usually cited on this point, is no authority

*2. That this rule applies whether the devise be to two persons or a larger number, though it be made to them "*respectively*," and though in the devise over the testator have not used the words "the said

for any such proposition. All that case decides is, that cross-remainders cannot be implied in the face of an express limitation over in a certain event with which such an implication would be inconsistent. See the remarks by the Lord Justice Turner in Atkinson *v.* Barton, 3 D., F. & J. 339. And the decision in Rabbeth *v.* Squire, 19 B. 77, 4 De G. & J. 406, was based on totally different grounds.

"The true rule is laid down by Ld. J. Turner:—'Cross-remainders are to be implied or not according to the intention. The circumstance of remainders having been created between the parties in particular events is a circumstance to be weighed in determining the intention, but is not decisive upon it.' Atkinson *v.* Barton, 3 D., F. & J. 339 (reversed on appeal, but on different grounds, 10 H. L. 313); see, too, Vanderplank *v.* King, 3 Ha. 1; Re Ridge's Trusts, 7 Ch. 665.

"4. Cross-remainders will be implied even though, as the result of legal rules, and not of the testator's intention, the class of persons between whom they are implied take different interests; if, for instance, some are tenants in tail, others only tenants for life, with remainders to their children in tail. Vanderplank *v.* King, 3 Ha. 1.

"5. Cross-remainders will be implied in a devise to the children of A, which carries to them only a life estate, with a gift over for want of such issue of A. Ashley *v.* Ashley, 6 Sim. 358.

6. "And where realty or personalty is given to several persons as tenants in common for life, with remainders to their issue, followed by a gift over if all should die without leaving issue, cross-limitations between the first takers and their families will be implied. Re Ridge's Trusts, 7 Ch. 665; Re Clark, 11 W. R. 871; see, too, Coates *v.* Hart, 3 D., J. & S. 504.

7. "But cross-limitations will not be implied so as to divest vested interests. The implication arises from the presumption against intestacy, but where there are vested interests there can be no intestacy. See Rabbeth *v.* Squire, 19 B. 70, 4 De G. & J. 406; Re Clark, 11 W. R. 871.

"Upon the same principle, when the testator has disposed of his whole interest in realty or personalty, if, for instance, absolute vested interests have been given to several as tenants in common, with a gift over upon the death of all in certain events, cross-limitations cannot be implied between them, as there can be no intestacy, and cross-limitations would divest vested interests. Skey *v.* Barnes, 3 Mer. 334; Bromhead *v.* Hunt, 2 J. & W. 459; Baxter *v.* Lash, 14 B. 612; Beaver *v.* Nowell, 25 B. 551.

"8. If, however, the interests are not vested, but contingent with a gift over upon the death of all before the interests vest, the argument against an intestacy applies, and no argument can be raised against cross-limitations on the ground that they would divest vested gifts, and therefore in all probability cross-limitations would be implied. Mackell *v.* Winter, 3 Ves. 236, 536; Scott *v.* Bargeman, 2 P. Wms. 68, 2 Eq. Abr. 542; Graves *v.* Waters, 10 Ir. Eq. 234.

"There are no grounds for supposing Scott *v.* Bargeman to be overruled. The point in Bauman *v.* Stock, 2 Ba. & Be. 406, was totally different. It was whether benefit of survivorship would be implied between tenants in common taking vested interests, and the incidental remarks of Lord Manners cannot be considered as overruling a case expressly approved by Lord St. Leonards in Veize *v.* Stoney, 1 Dr. & War. 348, and followed in Graves *v.* Waters." Theobald on Wills 417, *et seq.*

premises," or "all the premises," or "the same," or any other expression denoting that the ulterior devise was to comprise the entire property, and not undivided shares. (*y*)

[3. That the rule applies though the ulterior devise is on failure of issue at a particular period.]

4. That the rule applies, in regard to executory trusts at least, though there be an *express* direction to insert cross-remainders among *another* class of objects, or a limitation over among some of the *same* objects; and even in direct devises an express limitation of cross-remainders among *another* class of objects has been held not to repel the implication.

5. That the word "remainder," following a devise to several in tail, will raise cross-remainders among them. (*z*)

6. That it is no objection to the implication of cross-remainders that there is an inequality among the devisees whose issue is referred to; some of them being tenants in tail, and others tenants for life, with remainder to their issue in tail. (*a*)

7. That a devise to the children of A *for life*, and *for want and in default of such issue* then over, creates cross-remainders by implication for life among such devisees. (*b*)

[(*y*) See the author's first and second conclusion adopted, Taaffe *v.* Conmee, 10 H. L. Cas. 81, 85; Hannaford *v.* Hannaford, L. R., 7 Q. B. 116.]

(*z*) As to "reversion," see *ante* p. *553.

(*a*) Vanderplank *v.* King, 3 Hare 1. In this case the inequality was produced by the application of the *cy pres* doctrine in regard to the member of a class who was born after the death of the testator, and is therefore an important case in reference to that doctrine, as to which *vide ante* vol. I., p. *300. See also Lewis on the Law of Perpetuity 426.

Implication of cross-remainders not affected by wills act.—(*b*) The reader will probably have inferred, from the absence throughout the present chapter of any allusion to the failure of issue clause in the stat. 1 Vict., c. 26, that the writer conceives that the enactment does not affect the implication of cross-remainders from expressions of this nature. Such undoubtedly is his opinion; in support of which it will be sufficient to observe, that § 29 expressly excepts out of the statutory rule of construction, cases in which a contrary intention appears by the will, by reason of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise. Here an express estate tail is, by the prior devise, given to the person whose issue is referred to by the words, "in default of such issue," &c., from which the cross-remainders are implied; and hence it is clear that this point of construction remains wholly untouched by the enacted doctrine. [The whole line of limitations may, however, by the new construction, be so altered as to prevent any question as to cross-remainders arising; as, for instance, in Forrest *v.* Whiteway, 3 Exch. 367, stated *ante* p. *550, if the will in that case had been made after 1837.]

*CHAPTER XLIII.

WHETHER CROSS-EXECUTORY LIMITATIONS CAN BE IMPLIED AMONG DEVISEES IN FEE OR LEGATEES.

Cross-executory limitations not to be implied.

The question whether cross-executory limitations can be implied among devisees *in fee* arises when real estate is devised to several persons in fee, with a limitation over in case they all die under a given age, or under any other prescribed circumstances; in which case it is by no means to be taken as a necessary consequence of the doctrine respecting the implication of cross-remainders among devisees *in tail*, discussed in the last chapter, that reciprocal executory limitations will be implied among such devisees in fee. The principal difference between the two cases seems to be this:—In the case of a devise to several persons in tail, assuming the intention to be clear that the estate is not to go over to the remainder-man until *all* the devisees shall have died without issue, the effect of not implying cross-remainders among the tenants in tail would be to produce a chasm in the limitations, inasmuch as some of the estates tail might be spent, while the ulterior devise could not take effect until the failure of *all*. (*a*) On the other hand, in the case of limitations in fee of the realty, and of absolute interests in personalty (both which are clearly governed by the same principle), as the primary gift includes the testator's whole estate or interest, and that interest remains in the objects in every event upon which it is not divested, a partial intestacy can never arise for want of a limitation over.

To introduce cross-limitations among the devisees in such a case would be to divest a clear absolute gift upon reasoning merely conjectural; for the argument, that the testator could not intend the retention of the property by the respective devisees to depend upon the prescribed event not happening to the whole, however plausible,

(*a*) Indeed, it should seem that the doctrine against perpetuities would have presented an obstacle to its taking effect at all.

scarcely amounts to more than *conjecture. He *may* have such an intention; and, if not, the answer is, *voluit sed non dixit.*

If, therefore, a gift is made to several persons in fee simple as tenants in common, with a limitation over in case they *all* die under age, the share of one of the devisees dying during minority will devolve upon his representatives, unless and until the whole die under age.

Among the early cases, indeed, examples may be found of a different rule being applied to bequests of personalty, between which and devises in fee there seems, as before suggested, to be an intimate analogy.

Thus, in Scott *v.* Bargeman, (*b*) one bequeathed personalty to his wife, upon condition that she would pay £900 into the hands of S., in trust to lay out the same, and pay the interest to the wife for life, if she should so long continue a widow, and, after her death or marriage, in trust that S. should divide the £900 among his (the testator's) three daughters at their respective ages of twenty-one or marriage, provided that *if all his three daughters should die before their legacies should become payable*, then the wife should have the whole £900 paid to her. Two of the daughters died under age and unmarried, and the question was, whether the other was entitled to her sisters' shares. Lord Macclesfield decided in the affirmative, inasmuch as the mother was plainly excluded unless all the daughters died under twenty-one or marriage, and their shares did not vest absolutely in any of the three daughters under age, in regard that they might all die before twenty-one or marriage, in which case the whole was devised to the mother.

Cross-executory trusts implied among legatees.

This decision must be supported, if at all, on the ground that the court was authorized to insert cross-limitations among the daughters by necessary inference from the terms of the gift over,—a conclusion which it will be found very difficult to reconcile with subsequent decisions. (*c*)

Observations upon Scott *v.* Bargeman.

In Mackell *v.* Winter, (*d*) the next case on this subject, personal property was bequeathed to three persons, with an express bequest over to the other or others in case of the death of *one* particularly named, or of either of two couples of the three individuals named, under age

(*b*) 2 P. W. 68.

(*c*) Schenck *v.* Legh, 5 Ves. 452, 9 Id. 300; Bayard *v.* Smith, 14 Id. 470; and more particularly Skey *v.* Barnes, 3 Mer. 334, 342, *post* [where the decision is referred to another ground.]

(*d*) 3 Ves. 236, 536.

(but not of the other couple), and a bequest over of the entirety on the death of *all* three. Two *eminent judges differed in opinion whether a cross-executory trust providing for the death of such other couple could be implied. The case was this:—A testatrix directed her household goods, &c., to be sold, and the money arising from the sale, together with the residue of her personal estate, she bequeathed to her grandsons G. and J., and to her granddaughter C., to be equally divided between them share and share alike; the shares of her grandsons, with the interest or accumulation thereof, after a deduction for their maintenance and preferment, to be paid to them respectively on their attaining the age of twenty-one years, and the share of her granddaughter, with the interest and accumulation, at twenty-one or marriage. Then, after a direction for maintenance and preferment out of the interest, the testatrix declared, that in case her granddaughter C. should happen to die under the age of twenty-one years and unmarried, the share of the residue of her personal estate so given to her, with the accumulated interest thereon, should go and be equally divided between her two grandsons; and in case of the death of either of them, the whole should be paid to the survivor; and that in case either of her grandsons should die under the age of twenty-one, the share of her grandson so dying should go to the survivor of her two grandsons; *and in case her two grandsons should die under the age of twenty-one, and her granddaughter under twenty-one and unmarried*, the whole of their respective shares of the residue of her personal estate, with the accumulation thereon as aforesaid, should go and be paid to her nephew B. (It will be observed that the event, which happened, of the death of both the grandsons under twenty-one, and of them *only*, was not provided for.) Sir R. P. Arden, M. R., considered that there was no doubt that the grandchildren took a vested interest; *and as it was not taken out of them in the event that had happened, he conceived himself not authorized to supply the defect* in favor of the granddaughter; though he had no doubt as to the intention. But Lord Loughborough reversed this decree; thinking, on the one hand, that the shares did not vest in the grandsons until twenty-one, and, on the other, that there was a necessary implication in favor of the granddaughter, it being clear that what defeated (*quære, would precede?*) the gift over to the nephew, who could only take the entirety of the fund,

Bequest to A, B and C, with bequest over if *one* only, or certain two, or *all* died, but not providing for the death of the other *two*.

Implication of cross-executory bequest rejected by Sir R. P. Arden, but his decree overruled by Lord Loughborough.

and that on the death of *all* the grandchildren, must be a disposition of the whole in favor of the grandchildren, the preferable objects of the testator's bounty, *and to avoid a partial intestacy.*

Remarks upon Mackell v. Winter.

*The views taken of this case by the M. R. and the L. C., it will be seen, were wholly different: the former considering the gift as vested in the grandchildren, to be divested only in the event expressly provided for; and the latter as a *contingent* bequest to them, with an express cross-executory contingent bequest in a certain event, and an *implied* cross bequest in another event. There is certainly great difficulty in both branches of Lord Loughborough's hypothesis. According to the doctrine of all the authorities, the bequest clearly conferred a vested interest; (e) and, if vested, it was impossible, consistently with sound principles of construction, to divest it, except on the happening of the prescribed event; and the obstacle to this was the more insuperable, from the circumstance, that the express cross-limitations, so far as they went, did not establish a complete reciprocity between the legatees; for the share of the granddaughter at her death, under age, was to go to both the grandsons, but the share of one of the grandsons so dying was to belong exclusively to the other grandson. But, independently of this very material circumstance, there seems to have been no valid ground for divesting the shares in the event which had happened; nor, it is important to observe, does Lord Loughborough advance any such doctrine, for he evidently considered the holding the granddaughter to be entitled to be consequential on his holding the bequest of the whole to be *contingent*, his object being to "avoid a partial intestacy;" and it by no means follows, that if he had considered the interest as vested, he would have felt himself authorized to imply another gift in derogation of it. His reasoning does not appear to have satisfied the M. R., who, in a subsequent case, (f) expressed his conviction that his own determination was right.

Gift to children of A, payable at twenty-one,

In that conviction probably the reader will be disposed to join, on perusing the case of Skey v. Barnes, (g) which is a leading authority on this subject, and was as follows: A testator

(e) See cases *passim*, ch. XXV. Lord Loughborough certainly appears to have been greatly inclined to hold gifts to be contingent upon very slight grounds, as will appear by several of his decisions in that chapter.

(f) Booth v. Booth, 4 Ves. 402.

(g) 3 Mer. 334. See also Turner v. Frederick, 5 Sim. 466; [Templeman v. Warrington, 13 Id. 265; Cohen v. Waley,

bequeathed his personal estate to trustees for his daughter for life, and after her decease to and among all and every the child or children of his daughter and the lawful issue of a deceased child, in such proportions as his daughter should appoint, and in default *of appointment, then the same to go to and be equally divided between them, share and share alike, and if there should be but one child, then to such only child; the portion or portions of such of them as should be a son or sons, to be paid at his or their respective ages of twenty-one, and the portion or portions of such of them as should be a daughter or daughters to be paid at her or their respective ages of twenty-one or days of marriage; *but, in case there should be no such issue of the body of his daughter, or* ALL *such issue should die without issue before his or their respective portions should become payable as aforesaid,* then £1000 for his sister M. and her family, and £1500 for his niece A. and her family; and in case there should be no issue of either, for his nephew T., whom he also made his residuary legatee. The will contained a proviso, authorizing the trustees to apply the interest of the children's portions for their maintenance until they became payable. One of the children having survived her mother, and died under twenty-one and unmarried, her share was claimed by the survivors and the representatives of those who had attained their majority and died, principally on the authority of Scott *v.* Bargeman. (*h*) Sir W. Grant, though he thought that case to be right in its result, held that the bequests vested immediately, *and that the contingency had not happened on which they were to be divested;* consequently the share of the deceased child belonged to her representative.

and in case *all* should die, &c.

Cross-bequest *not* implied.

[So, in Baxter *v.* Losh, (*i*) where residue was bequeathed to be equally divided between A and B, their executors, administrators and assigns absolutely forever; but in case it should happen that the said A and B should *neither* of them be living at a particular period, then over; A died in the lifetime of the testatrix, and B survived the period specified, and it was contended on behalf of B, that there was an implied gift to him of the share of A; but Sir J. Romilly, M. R., held that there

Gift to two, and, if neither should be living at a given period, over.

15 Id. 318; Mair *v.* Quilter, 2 Y. & C. C. C. 465; Edwards *v.* Tuck, 23 Beav. 268; Beaver *v.* Nowell, 25 Beav. 551.]

(*h*) *Ante* p. *557.

[(*i*) 14 Beav. 612. In Currie *v.* Gould, 4 Beav. 117, the precise ground of the decision does not appear, but the gift seems clearly to have been a joint tenancy to the children.

was no such implied gift, and that the event not having happened on which the gift over was to take effect, the moiety of A had lapsed.

Distinction where prior gift is contingent.

Sir W. Grant distinguished Scott *v.* Bargeman and Mackell *v.* Winter on the ground that the primary bequests in those cases were contingent, and that nothing therefore was divested by admitting the implication. (*k*) This distinction is supported *by subsequent decision in cases where the contingent nature of the primary gifts was unquestionable. Thus in In re Clark's Trusts, (*l*) where a testator gave the residue of his personalty and the money to arise by sale of his real estate in trust in equal shares for A, B, C and D for life, and after their respective deaths for their children respectively as they should appoint, and in default of appointment for their respective children, with cross-limitations among the children of each parent *inter se* in the event of any dying under twenty-one; "but in case the said A, B, C and D should all happen to die without leaving any child, or leaving such, if such children should all happen to die under twenty-one," then over. A died unmarried: each of the others had children or a child who attained twenty-one; and the question was whether a cross-limitation of the share of A, the remainder in which had vested in no one, was to be implied in favor of the other families. Sir W. P. Wood, V. C., held that it was; (*m*) but that none of the other shares, which had all vested, would be divested, except in the event expressly provided for of all four of the named persons dying without leaving a child.

Again in In re Ridge's Trusts, (*n*) where a testator bequeathed residue in trust for his daughters A, B and C and any other daughters he might afterwards have, equally for life; and if all, any or either of them should die leaving issue, then to pay an equal part equally amongst the issue of each daughter that should die leaving issue; and if only one daughter should die leaving issue, then to pay the whole equally amongst the issue of such one daughter; but if all such daughters should die without leaving issue, then over. The testator

(*k*) 3 Mer. 342, 344.

(*l*) 32 L. J., Ch. 525. The distinction was denied by Lord Manners in Beauman *v.* Stock, 2 Ba. & Be. 406, who there held that cross-limitations were to be implied, although the primary gift was vested; but this was before Skey *v.* Barnes, and has not been followed.

(*m*) The limitations implied were for life and in remainder (subject to a power of appointment) following exactly the limitations of the original shares. See also In re Ridge's Trusts, *post.*

(*n*) L. R., 7 Ch. 665.]

left A, B and C his only daughters. A died leaving issue; then B died unmarried. It was held that a cross-limitation of the remainder in her share was to be implied in favor of the other two families.]

Skey *v.* Barnes [and the subsequent cases] may, it is conceived, be considered to have fixed the rule of law on this important doctrine of testamentary construction.

*CHAPTER XLIV.

RULE THAT WORDS WHICH CREATE AN ESTATE TAIL IN REAL ESTATE CONFER THE ABSOLUTE INTEREST IN PERSONALTY.

I. *Rule considered in relation to various Words by which an Estate Tail may be created.*

II. *Bequests over after such Gifts.*

III. *Effect of Limitations in strict Settlement upon Personal Property, &c.*

Words which create an estate tail in realty confer the absolute interest in personalty.

I.—It has been established by a long series of cases, (*a*) that where personal estate (including of course terms of years of whatever duration) (*b*) is bequeathed in language which, if applied to real estate, would create an estate tail, it vests absolutely in the person who would be the immediate donee in tail, and consequently devolves at his death to his personal representative, (whether he leaves issue or not,) and not to his heir in tail;[1] [that being the only mode in which personalty can be

(*a*) Roll. Rep. 356; Bunb. 301; 2 Ch. Rep. 14; 1 Lev. 290; 2 Vern. 324; 1 P. W. 290, Pre. Ch. 421; 8 Vin. Ab. 451, pl. 25, 26; 3 B. P. C. Toml. 99, 204, 277; 7 Id. 453, [1 Mad. 488]; 1 Ves. 133, 154; 2 B. C. C. 33, 127; 11 Ves. 257; 2 Ves. & B. 63; 1 Mer. 20, 271; 19 Ves. 73, 170, 574; 3 Mer. 176; 4 Mad. 360; 8 Sim. 22; [3 Drew. 668, 6 H. L. Cas. 1013.

(*b*) But not including a personal annuity created by will *de novo* and given to A and the heirs of his body: this gives A a conditional fee, and unless he performs the condition (*i. e.*, has issue) the annuity ceases on his death, Turner *v.* Turner, Amb. 776, 1 B. C. C. 316.]

1. To the effect that words of limitation, which would create an estate tail in real property, carry personal property absolutely, see 2 Rop. on Leg. 393; Darden *v.* Burns, 6 Ala. 365; McGraw *v.* Davenport, 6 Port. (Ala.) 319; Bell *v.* Hogan, 1 Stew. (Ala.) 536; Albee *v.* Carpenter, 12 Cush. 382; Hampton *v.* Rather, 1 Geo. (Miss.) 193; Kent *v.* Armstrong, 2 Halst. Ch. 637, 648; Cleveland *v.* Havens, 2 Beas. 101; Paterson *v.* Ellis, 11 Wend. 259; Swain *v.* Rascoe, 3 Ired. L. 200; Smith's Appeal, 23 Penna. St. 9; Mengel's Appeal, 61 Id. 248; Eichelberger *v.* Barnitz, 17 Serg. & R. 293; Mazyck *v.* Vanderhorst, Bailey Eq. 48; Henry *v.* Felder, 2 McCord Ch. 323; McLure *v.* Young, 3 Rich. Eq. 559; Hatton *v.* Weems, 12 Gill & J. 83; Dashiell *v.* Dashiell, 2 Harr. & G. 127; Goodwyn *v.* Taylor, 4 Call 305; Carson *v.* Kennerly, 8 Rich. Eq. 259; Bowman *v.* Tucker, 3 Humph. 647; Weeks *v.* Weeks, 5 Ired. Eq. 111; Chism *v.* Williams, 29 Mo. 288;

dealt with in order to make the interest in it analogous to an estate tail.] (c)

This rule is not confined, as has been sometimes affirmed, (d) to cases in which the words, if used in reference to realty, would create an *express* estate tail; for it applies also to those in which an estate tail would arise *by implication*, except in the particular case in which words expressive of a failure of issue receive a different construction in reference to real and personal estate. (e) Thus, where, by a will, which is regulated by the old law, personalty is bequeathed to A or to A and his heirs, and, if he shall die without issue, to B, (which would clearly make A tenant in tail of real estate,) he will take the absolute interest. (f)

Rule applies to estates tail *by implication*;

Horne *v.* Lyeth, 4 Harr. & J. 431; Davidge *v.* Chaney, 4 Harr. & McH. 393; Deane *v.* Hansford, 9 Leigh 253.

Limitations over in chattels have been supported like limitations of real property very generally, Holmes *v.* Williams, 1 Root 332; Pinckney *v.* Pinckney, 1 Bradf. 269; Hannan *v.* Osborne, 4 Paige 336; Lawrence *v.* Hebbard, 7 Paige 76; Kane *v.* Gott, 24 Wend. 641; Armstrong *v.* Kent, 1 Zab. 509, 524; Kent *v.* Armstrong, 2 Halst. Ch. 637; Ackerman *v.* Vreeland, 1 McCart. 23; Moffat *v.* Strong, 10 Johns. 16; Still *v.* Spear, 45 Penna. St. 168, S. C., 3 Grant Cas. 306; Clark *v.* Baker, 3 Serg. & R. 477; Deihl *v.* King, 6 Id. 32; Manigault *v.* Deas, Bailey Eq. 298; Henry *v.* Archer, Id. 535; Keith *v.* Perry, 1 Desaus. 353; Royall *v.* Eppes, 2 Munf. 479; Pleasants *v.* Pleasants, 2 Call 319; Cudworth *v.* Hall, 3 Desaus. 256; Robards *v.* Jones, 4 Ired. L. 53; Jones *v.* Sothoron, 10 Gill & J. 187. In many of the foregoing cases limitations of personal property over upon failure of issue of the first taker, have been held good as limited upon a definite failure of issue, where a like limitation of real property under the old rule would be construed to be upon an indefinite failure. As to this point, see further ch. XLI., *supra*.

But in Nix *v.* Ray, 5 Rich. 423, where the bequest was to three daughters, "and the future heirs of their body," and if either died without "any lawful heirs of their body," her share should go to the survivor or survivors, it was held that the daughters took life estates only; see also Henry *v.* Means, 2 Hill (S. C.) 328; Henry *v.* Archer, Bailey Eq. 535; Bridges *v.* Wilkins, 3 Jones Eq. 342. But where a testator bequeathed $9000 to each of two granddaughters, and if either should die "under the age of 21 years unmarried, and without having any child or children," over to the survivor, it was held that upon the marriage of either legatee her legacy vested absolutely in her, Stevenson *v.* Schriver, 9 Gill & J. 324.

Where a testator bequeathed certain slaves to A and B, in trust, that they should enjoy the produce of their own labor, it was held that this bequest was void, and that A and B, being residuary legatees, took the absolute property in the slaves, Bennehan *v.* Norwood, 5 Ired. Eq. 106.

As to limitations by way of remainder or executory devise in chattels, see ch. XXV. and XXVI., *supra*.

[(c) Per Wood, V. C., L. R., 2 Eq. 280.]

(d) Atkinson *v.* Hutchinson, 3 P. W. 259; [Doe *v.* Lyde, 1 T. R. 596.]

(e) See *ante* p. *498.

(f) Love *v.* Windham, 2 Ch. Rep. 14, 1 Lev. 290; [Chandless *v.* Price, 3 Ves. 102]; Campbell *v.* Harding, 2 R. & My. 390; Dunk *v.* Fenner, 2 R. & My. 557;

*The rule also applies to those cases in which, by the operation of the rule in Shelley's Case, (g) the terms of the bequest would, in reference to real estate, create an estate tail. Thus in Garth v. Baldwin, (h) where a testator devised real and personal estate to A., in trust to pay the rents and profits to S. for life, and after her death to pay the same to E. *for life*, and afterwards to pay the same to *the heirs of his body*, and for want of such issue, over; Lord Hardwicke held that E. was tenant in tail of the real estate and entitled absolutely to the personalty.

—to cases falling within the rule in Shelley's Case.

And of course it is immaterial in such a case whether the bequest itself contain the words of limitation, or refer to a devise of realty creating an estate tail. As in Brouncker v. Bagot, (i) where a testator devised his real estate to B. for life without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the *heirs of the body* of B.; and by a codicil he bequeathed his personal estate unto the same persons, and in the same manner, as he had by his will devised his real estate. It was contended that although as to real estate this rule of law was too strong for the intention of the testator, yet that a different construction might be put upon the words as applied to personalty, to prevent the application of the rule where it went to defeat the obvious intention, as in this case; but Sir W. Grant, M. R., held that the testator having declared his intention respecting his personal estate only by referring to the terms of the devise of the real estate, and as the law had ascertained those terms to give an estate tail in the realty, they would give the absolute interest in personalty. 2

Though the bequest be referential to the devise.

The next question is, whether words of distribution or other ex-

Simmons v. Simmons, 8 Sim. 22; [Caulfield v. Maguire, 2 J. & Lat. 176; Cole v. Goble, 13 C. B. 445; Webster v. Parr, 26 Beav. 236.]

(g) As to which, see *ante* p. *359.

(h) 2 Ves. 646; see also [Webb v. Webb, 1 P. W. 132, 2 Vern. 668]; Butterfield v. Butterfield, 1 Ves. 133, 153; Tothill v. Earl of Chatham, 7 B. P. C. Toml. 453, 1 Mad. 488, *nom.* Tothill v. Pitt; [Earl of Verulam v. Bathurst, 13 Sim. 374; Ousby v. Harvey, 17 L. J., Ch. 160; Williams v. Lewis, 6 H. L. Cas. 1013. The fact of the income only, and not the property itself, being given to A for life, is no argument against his taking the absolute interest, Butterfield v. Butterfield, 1 Ves. 133, 154; Glover v. Strothoff, 2 B. C. C. 33; In re Andrews' Will, 28 Beav. 608; and other cases overruling Smith v. Cleaver, 2 Vern. 38; and (on this point) Fonnereau v. Fonnereau, 3 Atk. 315.]

(i) 1 Mer. 271, 19 Ves. 574; see also Douglas v. Congreve, 1 Beav. 59.

2. Dougherty v. Dougherty, 2 Strobh. Eq. 63, 68.

Words of distribution, &c., annexed to the limitation to the heirs of the body, &c.

pressions marking a course of enjoyment inconsistent with the devolution of an estate tail, annexed to the limitation to the *heirs of the body*, are in *these* cases inoperative to vary the construction, *as we have seen they are now held to be in devises of real estate. (*k*) The affirmative would seem to follow from the principle of the preceding cases, though such a conclusion involves a direct contradiction of Jacobs *v.* Amyatt, (*l*) where personalty was bequeathed to A for life, and after her decease unto the heirs of her body lawfully begotten, *equally to be divided between them, share and share alike;* and, in default of such issue, over; and it was held by Lord [Loughborough], confirming a decree of Sir R. P. Arden, M. R., that A took a life interest only. ["The construction that the whole interest vested in A must," said Lord Loughborough, "expunge the words 'for life;' it must expunge the words which direct a division among the *children;* and it must expunge those words not for the purpose of giving it to one to take in the character of heir of the body, or in a course of descent, but to take it from all; not to let it go according to the general intent, which is the common ground, but to cross the intent. Upon that ground Doe *v.* Applin (*m*) does not apply." "Still less does King *v.* Burchell (*n*) apply."

Lord Loughborough therefore decided the case upon a distinction between the nature of real estate and the nature of personalty. The one is descendible, the other is distributable; (*o*) and to use "heirs of the body" regarding personalty is a misapplication of them, which has always (*p*) led the court more readily to infer from the context an intention to use them in a secondary and confined sense, than when they are used in a devise of realty. Thus in Hodgeson *v.* Bussey, (*q*) where by post-nuptial settlement a term was limited in trust for A the settlor's wife during her life, and after her death for the settlor for his life, and after his death for the heirs of the body of A by the settlor and their executors, administrators and assigns, and for want of such issue, over; it was held by Lord Hardwicke that "heirs of the body" were not words of limitation, but of purchase, and that A had a life interest only. The grounds of this decision are thus clearly given by Lord Hardwicke himself on a subsequent occasion:—"The governing

(*k*) See *ante* p. *363.

(*l*) 4 B. C. C. 542. [See the judgment, 13 Ves. 479, n.

(*m*) 4 T. R. 82, *ante* p. *424.

(*n*) Amb. 379, 1 Ed. 424, *ante* pp. *419, *424, n.

(*o*) Per Stuart, V. C., 1 Sm. & G. 444.

(*p*) See per Lord Hardwicke, 2 Atk. 90.

(*q*) 2 Atk. 89.

reason was that the limitation was to the heirs of the body, their executors, administrators and assigns; which words made it a plain case, *because there was no eye of an estate tail*, (*i. e.*, no intention that it should *go to issue *ad infinitum*); for it could not go from one heir of the body and his executors, &c., to another heir of the body and his executors, &c., and therefore must vest in the first person taking and his executors, &c.; the same as if it had been said, I give it after both their deceases in trust for the eldest son begotten, and if no son then to a daughter, their executors, &c." (*r*)

So in Wilson *v.* Vansittart, (*s*) where the bequest was to W. and his heirs male equally to be divided among them share and share alike; it was held by Smythe, B., and Bathurst, J. (L. Comms.,) that W. took an estate for his life with remainder to his *sons*.

In this case it will be observed the gift to heirs male was not expressly by way of remainder. But this would seem to present no great obstacle to the construction which was adopted. (*t*)

In Kinch *v.* Ward, (*u*) where freehold and leasehold estates were devised to A for life, and after his death to the heirs of his body, their heirs, executors, administrators and assigns, but if A should die without issue, over; it was assumed that A was tenant in tail of the freeholds, but it was contended on the authority of Hodgeson *v.* Bussey that he was tenant for life only of the leaseholds. Sir J. Leach however decided that he took the leaseholds absolutely, distinguishing Hodgeson *v.* Bussey because there the gift over was in default of *such* issue, whereas here it was after a general failure, and therefore too remote.

Whatever may be thought of this distinction, the fact remains that Sir J. Leach dealt with the leaseholds as being subject to different considerations from the freeholds, and did not think it sufficient to dispose of the question regarding the former that, notwithstanding the superadded words, an estate tail was created in the latter.

Again in In re Jeaffreson's Trusts, (*x*) already stated, Sir W. P.

(*r*) 2 Ves. 236, 660. Lord Chelmsford refers the decision partly to its being a settlement, and thus intended as a provision for the issue of the marriage, 6 H. L. Cas. 1022; but Lord Hardwicke does not rely on that point.

(*s*) Amb. 562.

(*t*) See Chamberlayne *v.* Chamberlayne, 6 Ell. & Bl. 625, *ante* p. *328. Mr. Jarman, however, considered it "an extraordinary decision, there being not only no gift to sons, but no gift even to heirs by way of remainder."

(*u*) 2 S. & St. 409.

(*x*) L. R., 2 Eq. 276, *ante* p. *81. See also Symers *v.* Jobson, 16 Sim. 267.

Wood, V. C., said he did not question the decisions that words clearly intended to create an estate tail in realty would be taken to give an absolute interest in personalty, that being the only mode in which personalty can be dealt with to make the interest in it analogous to an estate tail. "But (he said) I think upon *such a gift of personal estate as this, the question is—not whether the construction of the clause taken simply word by word would give an estate tail—but whether, regard being had to the whole will, considering that the property is personal and not real estate, there is an intention manifested that 'heirs of the body' should be used in its proper sense. The proposition cannot be taken absolutely in its full integrity that every form of expression which will create an estate tail in realty will give an absolute interest in personalty, which would contradict the rule established in Forth *v.* Chapman. (*y*) And without pausing to consider whether the set of words used here would bring this case within the rule in Shelley's Case, regard being had to the decision of D. P. in Jesson *v.* Wright, (*z*) I think the use of words like these when accompanied with a discretionary power of education for those heirs of the body, and with an express discretion for division at twenty-one, justifies me in saying that the testator did not point to heirs *successive*, who are to continue proprietors of the fund in question to an extent which the law would not allow, and which the law would cut short by giving the fund to the first taker; but rather to a set of persons, heirs of the body of A who are a co-existing body and not persons taking in succession. Now although 'heirs of the body' is not so flexible a term as 'issue,' that it does not invariably create an estate tail is evident from Hodgeson *v.* Bussey and Sands *v.* Dixwell." (*a*) He therefore held that A did not take an absolute interest.]

A point of still greater difficulty arises in determining to what extent the rule applies to cases in which the word *issue*, occurring in devises of real estate, is a word of limitation.

Where the bequest is to a person and his issue simply.

This, at least, is clear, that a simple bequest to A and his issue, which, if the subject of disposition were real estate, would indisputably make A tenant in tail, (*b*) confers on him the absolute ownership in personalty.[3]

(*y*) 1 P. W. 663.

(*z*) *Ante* p. *365.

(*a*) But Sands *v.* Dixwell was the case of an executory trust, and is the same as Robberts *v.* Dixwell, (8th Dec., 1738,) 1 Atk. 607, stated *ante* p. *346.]

(*b*) See *ante* p. *412.

3. In the case of Dashiell *v.* Dashiell,

Whether "issue" explained to mean issue *at the death.*

Lord Hardwicke, in Lampley *v.* Blower, (*c*) admitted this proposition, though he held that a bequest over to the survivor, in case either of the legatees died without *leaving* issue, (which in legal construction means, in regard to *personalty*, (*d*) issue living *at the death*,) explained "issue" in the body of the devise to be used in the same sense.

To four persons and the issue of their respective bodies, if any die without issue at death, over.

*This seems to be rather a strained construction, and is inconsistent with Lyon *v.* Mitchell, (*e*) which is a direct authority as to the effect of a bequest simply to A and his issue. A testator bequeathed personalty to his four sons, share and share alike, as tenants in common, *and to the issue of their several and respective bodies lawfully begotten;* but in case of the death of any or either of them without issue lawfully begotten *living at the time of his or their respective deaths*, then the part or share of him or them so dying should go to the survivors or survivor equally, and to the issue of their several and respective bodies lawfully begotten. Sir T. Plumer, V. C., after reviewing the authorities, held, upon the general rule, that as the words of the bequest would have made the sons tenants in tail of real estate, they *took absolute interests* in the personalty, with benefit of survivorship in case any or either of them died without issue living at their death respectively.

2 Harr. & G. 127, 131, Stephen, J., says: "It is also worthy of recollection, that this is the case of a bequest of personal property, where the court are always studiously anxious to effectuate the intention of the testator, and will lay hold of the smallest circumstance to limit the failure of issue to the death of the first taker, so as to make the limitation over good as an executory bequest. Wherever it is manifestly the intention of the testator, as we think was his intention in this instance, to limit personal property over, upon a failure of issue at the death of the first taker, that intention must be carried into effect."

Where there is a bequest to A and her children, the general rule is that A has the absolute estate, Dougherty *v.* Dougherty, 2 Strobh. Eq. 63; Shearman *v.* Angel, Bailey Eq. 351; Johnson *v.* Johnson, McMullan Eq. 345; *contra*, Noe *v.* Miller, 4 Stew. (N. J.) 234; but if it be "to A and his heirs," A will take the whole absolutely, Ib.; Wintermute *v.* Snyder, 2 Gr. Ch. (N. J.) 489; State *v.* Skinner, 4 Ired. L. 57; Robards *v.* Jones, 4 Ired. L. 53.

Where the bequest was "to my nephews W. & T., their heirs and assigns forever; but in case both my nephews shall die without leaving issue of their bodies," then over, it was held that W. & T. took an absolute interest, Cudworth *v.* Hall, 3 Desaus. 256.

In Horne *v.* Lyeth, 4 Harr. & J. 431, the bequest was of a term for years to S., "during her natural life, and after her decease" to her heirs, and it was held that S. took the whole of the unexpired interest in the term.

(*c*) 3 Atk. 397. [See *ante* p. *413, n. (*l*).]

(*d*) See *ante* p. *498.

(*e*) 1 Mad. 467.

[Again, in Parkin *v.* Knight, (*f*) where the limitation was of real and personal property to the testator's nephews or (read "and") their lawful issue, his nephew A to have Blackacre exclusive of his other share; Sir L. Shadwell, V. C., held that they took an estate tail in the realty, and an absolute interest in the personalty. This was somewhat aided by the direction as to Blackacre. And at this day the court would be less ready to read "or" as "and." (*g*)

Bequest to several and their lawful issue.

This construction has been even extended to a case where money was directed to be *settled* on A and his issue.] (*h*)

To be settled on A and his issue.

Our next inquiry is, whether a bequest to A *for life*, and after his death to his issue, operates, by force of the same rule of construction, to vest the absolute interest in A.

Bequest to A *for life*, and after his death to his issue;

Now as such a *devise* would clearly create an estate tail in A, and as it has been shown that the rule which makes the legatee absolute owner of personalty where he would be tenant in tail of real estate, applies to gifts falling within the rule in Shelley's Case (*i*) where *heirs of the body* are the words of limitation, as well as to those in which an *implied* gift is raised in the *issue;* and as, lastly, as we have just seen, the rule applies where the *gift to the ancestor and issue is in one clause; (*k*) [the same rule, if strictly followed out, would lead to the conclusion,] that, in the case suggested, A would be absolutely entitled.

This conclusion, however, is encountered by Knight *v.* Ellis, (*l*) where the testator gave certain moneys to trustees, upon trust to permit his nephew T. to receive the interest *during his natural life*, and after his decease he gave the said moneys to the *issue male* of his nephew, and in default of such issue he gave the same over. The question was whether T. was entitled for life, or absolutely. Lord Thurlow decided that he had a life interest *only*.[4] In reference to the cases establishing the rule, that

—A held entitled for life only, Knight *v.* Ellis.

[(*f*) 15 Sim. 83. See also Donn *v.* Penny, 19 Ves. 547; Beaver *v.* Nowell, 25 Beav. 551; Young *v.* Davies, 2 Dr. & Sm. 167 (offspring.)

(*g*) *Post* p. *572, n. (*k*).

(*h*) Samuel *v.* Samuel, 9 Jur. 222, 14 L. J., Ch. 222, as to which see *ante* p. *346, n. (*l*).]

(*i*) That the rule in Shelley's Case applies, whatever be the word of limitation used, see *ante* p. *339.

(*k*) As to such cases of *devises*, see *ante* p. *412.

(*l*) 2 B. C. C. 570.

4. So where the bequest was of a slave to M. "for to be at her disposal during her natural life, then to go to the benefit of her heirs," it was held that M. took an

words which would create an estate tail in real estate confer an absolute interest in personalty, he said, "It must have occurred to the judges who decided those cases, that under the idea of making the rules of decision as to leasehold estates analogous to those which are applied to estates of inheritance, the intention of the testator must be much oftener disappointed than carried into effect, and then there is no wonder that the court should try to get out of the technical rule by any means that it can. Now what do the cases come to? A man by his will devises to A for life, there being plainly an interest only for life given; if that were all, the disposition would end there as to A, and any other gift would be effectual after his death. The testator then gives the same fund (*quære, land*) over to B after failure of issue of A. What is the court to do? It is clear that a life interest only is given to A. It is clear that no benefit is given to B, while there is any issue of A. The consequence is, that as no interest springs to B, and no express estate is given after the death of A, the intermediate interest

estate for life only. Riggins *v.* McClellan, 28 Mo. 23. And in Noe *v.* Miller, 4 Stew. (N. J.) 234, the legacy was to E., "to be hers and her child's or children's," it was held that E. took a life estate, with remainder to her children. See also Kent *v.* Armstrong, 2 Halst. Ch. 637. But in a case where the bequest was bank stock to the executrix in trust, to pay the dividends to testator's daughter for life, and, upon the expiration of the charter of the bank, the shares absolutely to the daughter, without any limitation over, it was held that the daughter took the stock absolutely, and that her administrator had a right to call for a transfer of it, Jasper *v.* Maxwell, 1 Dev. Eq. 361. In this case it was said by Ruffin, J., at page 363: "The question made upon the will has no difficulty. The bank stock is bequeathed to the executors, in trust to receive the dividends as declared, and pay them over to the testator's daughter during her life, or until the charters expire, and upon that event, unless the charters be renewed, the stock itself is given to the daughter. In her then are united the present right to the whole profits, and the absolute ultimate dominion—which gives as perfect a property as is known to the law. The *cestui que trust* can call for the legal estate at her will. It is not like the case of a bequest in trust for the *maintenance* of another. There the trustee must retain the property, in order to provide out of the profits for the support of the object of the testator's bounty. He must keep the fund in his own hands, lest it be wasted. But here the fund is to go (eventually) directly to the daughter, and in the meanwhile, the whole profits, not as a maintenance to be provided by the executor, but as a general pecuniary legacy. The only purpose of the testator seems to have been, to save his daughter the trouble of receiving the dividends personally at the bank, and to give his advice to her to keep that fund in stock, as long as she could, in preference to vesting it otherwise. But whether that was his intention or not, such is necessarily the construction; for the law will not permit a testator to pass the absolute property, and then fetter it, without a limitation over, with restrictions inconsistent with the general ownership created by him."

would be undisposed of, unless A was considered as taking for the benefit of his issue, as well as of himself; and as the words in this case are capable of such amplification, the court naturally implies an intention in the testator that A should so take, that the property might be transmissible through him to his issue, and he was therefore considered as taking an estate tail, which would descend on his issue. Now, an estate in chattels is not transmissible to the issue in the same manner as real estate, nor capable of any kind of descent, and therefore an estate in chattels so given, from the necessity of the thing, gives the whole interest to the first taker; but if the testator, without leaving it to the necessary *implication, gives the fund expressly to the issue, they are not driven to the former rule; but the issue may take as purchasers, and then there is an end of the enlargement of any kind, of the estate of the tenant for life; for another estate is given after his death to other persons, who are to take by purchase. It no longer rests on conjecture."

Bequest to two for their lives, and at their deaths to their issue.

[Again, in Heather *v.* Winder, (*m*) the first gift was of leaseholds to the testator's son W. for life, and after his death to his issue; but in case he should leave no lawful issue, then to the testator's daughters A. and H., conjointly, during their lives, and at their deaths to their lawful issue. The testator's three children survived him, and W. and H. died without leaving issue; A. had several children. Sir J. Leach, V. C., held, that A. became entitled on the death of W., but whether on the ground that W. took a life estate only, or by executory bequest on the principle of Lyon *v.* Mitchell, (*n*) does not appear. Sir C. Pepys, M. R., however, professing to follow Sir J. Leach, decided that under the gift over A. took only for life. As she was living it was not necessary to decide as to the rights of her issue.]

Att.-Gen. *v.* Bright opposed to Knight *v.* Ellis.

The cases of Knight *v.* Ellis [and Heather *v.* Winder] seem to be directly opposed to Att.-Gen. *v.* Bright, (*o*) where a testator, after bequeathing to two persons the interest of a sum of £500, stock, gave the fund, after the decease of the survivor, to A, to receive the interest during her life, and then *to her issue;* but, in case of her death without issue, the £500 stock to be divided between her father's children by his second wife; and, in default of any children by his second wife living at the testator's de-

[(*m*) 5 L. J., Ch. (N. S.) 41.
(*n*) *Ante* p. *567.]

(*o*) 2 Kee. 57.

cease, he gave the same to such second wife. It was contended, on the authority of Knight *v.* Ellis, and some earlier cases, that A had a life interest only. But Lord Langdale, M. R., held that the effect of giving the interest of the £500 stock to the legatee for her life, and then the principal to her issue, was to give her an absolute interest in that sum.

Knight v. Ellis followed in Ex parte Wynch.

[But the authority of Knight *v.* Ellis was recognized in Ex parte Wynch, (*p*) where the testator bequeathed an annuity to A "for her life and the issue from her body lawfully begotten, on failure of which to revert to my heirs." Lord Cranworth, C., (who said the will was clearly to be read as if the gift to the issue had been expressly limited after the death of A,) and Sir *G. Turner, L. J., affirming the decision of Stuart, V. C., held that A had only a life interest, and that the issue took by purchase. They agreed with the decision in Knight *v.* Ellis, and moreover considered that it was binding upon them, and that the decision in Att.-Gen. *v.* Bright was not sustainable. The L. C., after adverting to some of the principle cases which had been cited to prove that A was absolutely entitled, said: "In all those cases either the technical words 'heirs of the body' have occurred, or there has been nothing to show that the words 'issue,' 'children,' or the like have not been intended merely to define or explain the extent of the interest given to the first taker; and I see nothing in these decisions compelling me to hold that where technical words are not used, and where the interest of the first taker is expressly confined to a life estate, I am bound to act in the construction of the bequest of personalty on principles derived from laws of tenure, and not resting on intention. It was on this ground that Lord Thurlow acted in Knight *v.* Ellis."

Att.-Gen. v. Bright overruled.

The rule is thus settled in conformity with Knight *v.* Ellis. (*q*) It applies *a fortiori* to a bequest of personalty to A for life, and after his death to his issue in equal shares and proportions; and] it lets in, like a corresponding gift to children, (*r*) all the objects who are living at the testator's death, and all who come *in esse* during the life interest. (*s*)

Distinction between gift to one at a time and gift

[During the argument in Knight *v.* Ellis, Lord Thurlow said that it made all the difference in gifts of this nature, whether by the will all the issue were to take or one only. "The question is," he said, "whether they are words of limita-

[(*p*) 1 Sm. & G. 427, 5 D., M. & G. 188. K. Bruce, L. J., concurred in the decision on distinct grounds.

(*q*) See also Goldney *v.* Crabb, 19 Beav. 338; Waldron *v.* Boulter, 22 Beav. 284.

(*r*) *Ante* p. *156.

(*s*) Jackson *v.* Calvert, 1 J. & H. 235. See similar construction where the words "heirs of the body" are used, Jacobs *v.* Amyatt, *ante* p. *564.

tion? If it went to one son, it must be by way of limitation; if to all, it must be by purchase. If it is to go by way of limitation, then it vested in the ancestor; if by purchase, all the sons must take." (t) By means of this distinction, perhaps, the decision in Jordan v. Lowe (u) may be sustained. Leaseholds were there bequeathed in trust for A for life, and, after his decease, for his issue male lawfully begotten, severally and respectively according to their respective seniorities, and for default of such issue male as aforesaid, then over; Lord Langdale, M. R., held that the words were *such as would have created an estate tail, and A was therefore absolutely entitled. "Upon what grounds Lord Langdale proceeded," said Lord Cranworth, (x) "we are left in entire ignorance. But it may be that he thought there, that the words must be treated as words of limitation, as it was to go to them in succession forever according to their seniorities. That might have been the ground upon which he proceeded in that case: that also would not be inconsistent with Knight v. Ellis."

to all the issue together.

It has been seen that Lord Thurlow (y) distinguished the case of a bequest to A *for life*, followed (without any express gift to issue) by a limitation over in default of issue of A. This, he said, of necessity gave the absolute interest to A.[5] It was so assumed in Ranelagh v. Ranelagh, (z) and there is nothing in Ex parte Wynch to suggest that the distinction is not a sound one as regards wills that are subject to the old law. But in Procter v. Upton, (a) where personalty was given to be invested for the benefit of A for life, and if he died without issue, over; and by codicil A was forbidden to meddle with the principal; Lord Hardwicke held that A was but tenant for life; adding, however, that if the case had stood singly on the will, A would have been entitled to the whole.

To A for life, and in default of issue, over.

(t) 2 B. C. C. 575.

(u) 6 Beav. 350. See also Harvey v. Towell, 7 Hare 231, 12 Jur. 241—bequest to A for life, remainder to his eldest son for life, remainder to his eldest issue male only for the time being *ad infinitum* forever.

(x) 5 D., M. & G. 212.

(y) *Ante* p. *568. See also his *dictum*, Att.-Gen. v. Bayley, 2 B. C. C. 557.]

5. Pritchett v. Cannon, 10 Rich. Eq. 394. In this case, at page 406, it is said by Johnson, Ch.: "Suppose upon the death of Anna he had limited over the property to the brothers and the heirs of their bodies, by words which applied to real estate would have created an estate tail in England; it is well settled that such words would have given them an absolute interest in personalty."

[(z) 2 My. & K. 441, *ante* p. *526.

(a) 5 D., M. & G. 199, n. See also In re Banks' Trust, 2 K. & J. 387.

Effect of real and personal property being included in same gift.

Again the *mere* circumstance that real and personal estate are both dealt with by the same set of words will not compel the court to decide that the personalty is intended to go as the realty and consequently vests absolutely in the first taker. (*b*) But the circumstance of the two sorts of property being jointly dealt with may fairly be taken into account on the question whether there is "an eye to an entail:" (*c*) and if the personal is clearly *a mere adjunct to the real, *e.g.*, a leasehold garden to a freehold house, an intention that both should devolve as the realty may reasonably be inferred.] (*d*)

General conclusions.

Upon the whole the result is, that the unqualified terms in which the rule has been often laid down, [pointing as they do] to the conclusion, that a bequest of personalty confers the absolute interest wherever the language of the will is such as would create an estate tail of land, [are not justified by the decisions. In many of them, as we have seen, the court has refused to] carry the rule to the extreme point to which the cases have gone in adjudging "issue" to be a word of limitation as to real estate; (*e*) the effect of such construction, by entitling the first taker absolutely, being in general to defeat the intention of the testator. Hence also (as elsewhere hinted), (*f*) the inclination to adopt the construction which reads the word "child," "son," or any other such informal expression, as a word

(*b*) Jackson *v.* Calvert, 1 J. & H. 235. See also In re Banks' Trust, 2 K. & J. 387.

(*c*) See Tate *v.* Clarke, 1 Beav. 100 (personalty given to A by reference to devise of realty to A *and his issue*); Dunk *v.* Fenner, 2 R. & My. 557. The last case has been cited as laying down a rule that, where realty and personalty are blended, the personalty goes as the realty; which, said Giffard, V. C., "is bad law," Herrick *v.* Franklin, L. R., 6 Eq. 593. *Qu.*, however, whether in Dunk *v.* Fenner, it was intended to lay down any such rule. The case seems rather to turn on the special terms showing an intention that realty and personalty should go together, and also that there should be an entail. Bequest to A for life, and after his death to his heirs; A takes for life only.—In Herrick *v.* Franklin real and personal estate was given to A for life, and after his death to his heirs (*general.*) This was held to give A a life interest only. Such a gift has never been held to vest the absolute interest in personalty in A by analogy to the rule in Shelley's Case, and it lacks the essential ingredient of an intention to benefit issue *ad infinitum* to bring it within the rule discussed in the present chapter. Smith *v.* Butcher, 10 Ch. D. 113, is a distinct decision that the rule in Shelley's Case is inapplicable to such a gift. Powell *v.* Boggis, 35 Beav. 535, and Comfort *v.* Brown, 10 Ch. D. 146, must rest on the special terms of the wills. See as to the former, *ante* p. *81.

(*d*) Per Wood, V. C., Jackson *v.* Calvert, 1 J. & H. 238. See also Douglas *v.* Congreve, 1 Beav. 59.]

(*e*) *Ante* p. *438.

(*f*) *Ante* p. *397.

of limitation, is much less strong in reference to personal than real estate. (*g*) [Hence, too, it has been finally decided that the rule in Wild's Case does not apply to bequests of personalty.] (*h*)

In not a few cases, too, bequests to a person and his children have been read as conferring on the original legatee a life interest only, with an ulterior gift of the absolute interest in favor of the children, (*i*)—a species of construction which further illustrates the disinclination of the courts to hold ambiguous terms of this description to operate as words of limitation in reference to personal estate.

Gift to issue by way of substitution.

The word "issue," under a joint gift to the ancestor and issue, has also been sometimes construed as introducing a substituted gift in favor of these objects, in the event of the failure of the original gift to the ancestor, [by his death either in the lifetime of the testator or of a previous tenant for life; the ancestor,] if the gift to him takes effect, becoming solely and absolutely entitled.

To five persons and their respective issue *per stirpes*.

Thus, in Pearson *v.* Stephen, (*k*) where the testator bequeathed *to trustees so much stock as should be sufficient to pay thereout the yearly sum of £1000 to his wife for her widowhood; and, after her decease or marriage, in trust for his five sons (naming them) *and their respective issue*, if any, to be divided among them in equal shares; such issue to take *per stirpes*, and not *per capita*. He also gave £4000 to be invested in stock, in trust to pay the dividends to his daughter S. during her coverture, and, upon the death of G., her husband, to transfer the capital to her for her sole use; but, in case G. should survive testator's daughter, then in trust for his said five sons *and their respective issue*, (if any), to be divided among them in equal shares and proportions; such issue to take *per stirpes*, and not *per capita*. The testator also gave the residue of his personal estate to his said five sons "*and their respective issue (if any)*;" such issue to take *per stirpes*, and not *per capita*, to be divided among them in equal shares and proportions; the shares of such of them as should have attained the age of twenty-one years, to be paid to them respectively forthwith after the testator's

(*g*) See Gawler *v.* Cadby, Jack. 346; Stone *v.* Maule, 2 Sim. 490; Malcolm *v.* Taylor, 2 R. & My. 416. [But see Scott *v.* Scott, 15 Sim. 47.]

(*h*) *Ante* p. *397.

(*i*) *Vide* cases stated *ante* p. *398.

(*k*) 2 D. & Cl. 328, 5 Bli. (N. S.) 203. Of course there is less difficulty in the adoption of this construction where the gift is to a person *or* his issue, *vide ante* vol. I., pp. *515, *516; also Price *v.* Lockley, 6 Beav. 180.

decease; the shares of such of them as should be under that age, to be paid to them when and as they should respectively attain such age. The question was, what interests the five sons (all of whom survived the testator) took under these bequests? Sir J. Leach, M. R., held that the sons took life interests only (subject, as to the £4000, to the contingency mentioned in the will), with the ulterior interest for their children. But this decree was reversed in D. P., where it was decided that, under the first bequest, the sons became absolutely entitled; and that, with respect to the £4000, in the event of S. dying in the lifetime of G., the sons of the testator *living at such event* would be absolutely entitled to the stock in equal shares; but if any of the sons should die in the lifetime of S., leaving issue, such issue, if living at the death of S., (*l*) would be entitled to the share or shares of the fund, which their parents would have been entitled to, if living, such issue to take the shares in question equally among them; and it was also adjudged that the sons, at the death of the testator, took an absolute interest in the residue. And an opinion was expressed by Lord Brougham, that, if any of the sons had died in the lifetime of the testator, his children, living at the testator's death, would have taken, by substitution, the share of the parent.[6]

Remarks on Pearson v. Stephen.

Here, it will be observed, the words "and their respective *issue" were considered to raise a gift by substitution, to take effect, as to all the bequests, in the event of any of the legatees dying in the testator's lifetime leaving issue, and, as to the £4000 stock, in the further event of their dying during the suspense of the contingency leaving issue. The clause directing that the issue should take *per stirpes* seems to be decisive against the word being construed as a word of limitation.

To the daughters of T. and their issue, with benefit of survivorship.

Pearson *v.* Stephen was referred to in Gibbs *v.* Tait, (*m*) where a testator bequeathed the residue of his personal estate to his wife during her widowhood, and after her decease or marriage, he gave what should be remaining one moiety to J., the son of T., his executors and administrators, and the other moiety equally among all the daughters of T. *and their issue*, with benefit of survivorship and accruer: Sir L. Shadwell, V. C., held that the daughters living at the distribution of the fund were absolutely entitled, and not (as had been contended) concurrently with

[(*l*) As to this, see *ante* p. *189, n. (*b*).] 137.

6. Mathes *v.* Hammond, 9 Rich. Eq. (*m*) 8 Sim. 132.

their issue, which, he observed, was an inconvenient construction. He observed that the case was weaker than Pearson *v.* Stephen. This remark shows that the V. C. considered the case before him to belong to the same class as the cited authority: perhaps the clauses of accruer (which are not stated) may have aided this interpretation.

Remark on Gibbs *v.* Tait.

[The decision in Pearson *v.* Stephen was followed in Dick *v.* Lacy, (*n*) where real and personal estate was bequeathed to A for life, and after her decease to the daughters of B *and their descendants per stirpes*, to hold to them their heirs and assigns forever; and it was held by Lord Langdale that the limitation to descendants *per stirpes* was a gift to them by way of substitution for their ancestress in case she died in the lifetime of the tenant for life.]

Bequest to several and their descendants *per stirpes.*

Sometimes a testator, having in one instance made an express and particular substitution of issue, thereby affords a ground for applying a similar construction to a bequest in the same will to a person and his issue simply; the inference being, on a view of the entire will, that the intention is the same in the respective cases.

Thus, in Butter *v.* Ommaney, (*o*) a testator bequeathed £2000 to the children of his late sister B and their lawful issue, in case any of them should die leaving lawful issue. He also gave unto *and among all and every the child and children of his late brother Jacob *and their issue* (except his nephew A), the sum of £2000 to be equally divided among them, share and share alike, to be paid within twelve months next after his (the testator's) decease. At the date of the will, there were three children of the testator's brother, who had children, and other children were dead leaving issue. It was contended, that the words "and their issue" were words of purchase, and let in the issue of the deceased children; but Sir J. Leach, M. R., held, that the three children of Jacob living at the date of the will were absolutely entitled to the legacy.

Issue not entitled concurrently with ancestor.

And here it may be observed that, where (as in the two preceding cases) the original legatees are living at the death of the testator or the period of distribution (whichever may happen to be the period of ascertaining the objects), it becomes unnecessary to determine whether

[(*n*) 8 Beav. 214. See also Hedges *v.* Harpur, 9 Beav. 479 (issue to take only their parent's share.)]

(*o*) 4 Russ. 70. [See also In re Stanhope's Trusts, 27 Beav. 201.]

"issue" is a word of limitation or of substitution; the original legatees being entitled to the whole, according to either construction. Hence the only really adjudged point in the two last cases was the rejection of the claim of the issue to participate concurrently with the original legatees.

Issue held entitled concurrently with ancestor.

An instance of the admission of such concurrent claim occurs in Clay *v.* Pennington, (*p*) where a testator, in a certain event, bequeathed a residuary fund to the children of his brother B *and their lawful issue* in equal shares, or unto such of them as shall prove their right within two years after notice in the London Gazette: Sir L. Shadwell decided that all the descendants of B who were living at the period in question were entitled to participate; which of course involved a denial of the proposition that issue was here used as a word of limitation.

Bequests over after gifts in question, when void.

II.—A necessary consequence of the rule, that words which create an estate tail in realty confer the absolute interest in personalty, is, that all bequests ulterior to such a gift are void;[7] but this principle does not apply to cases in which personal estate is limited in such terms to several persons not *in esse* successively; in which case the successive limitations, though having the form of remainders, operate simply as substitutional or *alternative* bequests, each gift in the series being dependent upon the event of the preceding gift or gifts not taking effect.

Thus, where a term of years is limited to A for life, with *remainder to his first and other sons successively in tail male, with remainder to the first and other sons of B in tail. If A die without having had a son, it is clear that the bequest to the *first* son of B (for no son after the first could ever take) is good; but if A have a son, that son becomes entitled absolutely, to the exclusion of the ulterior legatees; so that the limitation is *in effect* a bequest for life, and after his death to his first son absolutely, and if he have no son, to the first son of B; and being necessarily to take effect within the period of a life in being is free from objection on the ground of remoteness.

To illustrate in detail a point apparently so clear upon principle

(*p*) 7 Sim. 370. [See also Law *v.* Thorp, 27 L. J., Ch. 649, 4 Jur. (N. S.) 446; and Prior on Issue 37, 38.]

7. Chism *v.* Williams, 29 Mo. 288; State *v.* Mann, 3 Harr. & J. 238; Davidge *v.* Chaney, 4 Harr. & McH. 393; Wilkins *v.* Taylor, 5 Call 150; Deane *v.* Hansford, 9 Leigh 253; Williamson *v.* Ledbetter, 2 Munf. 521.

might seem to be gratuitous labor, were it not that at one period the authorities (including a decision of the Supreme Court of Judicature) sanctioned a contrary doctrine.

In Brett *v.* Sawbridge, (*q*) a testator, who was a mortgagee in possession of a term of years, devised it (supposing himself to be seized of an estate of inheritance) to J., son of H., for life, remainder to his first and other sons in tail male, remainder to two other sons of H., and their sons successively in tail in like manner, remainder to all other the sons of J. successively in tail, with remainder to the right heirs of B. and W. Though it appeared that none of the tenants in tail had come *in esse*, Sir J. Jekyll, M. R., held that the limitation over was void; and his decree was affirmed in D. P. The reasons urged in its support were, first, that as the testator intended to dispose of the inheritance, the term did not pass; and secondly, that the limitation over being after an indefinite failure of issue, was void for remoteness. It is not stated upon which ground the House proceeded, but, most probably, as the reporter assumes, upon the latter, as the objection that the testator intended to dispose of the inheritance could not be sustained for an instant as a reason against the devise operating upon the term.

Brette *v.* Sawbridge overruled by Pelham *v.* Gregory.

In regard to the alleged remoteness of the limitation to the heirs of B. and W., however, the case is completely overruled by Pelham *v.* Gregory, (*r*) where the Duke of N. devised all his freehold and leasehold estates to T. for life, remainder to his *first and other sons in tail male, remainder to H. for life, remainder to *his* first and other sons in tail male, with remainders over: T. was living, but had no son; H. had a son, who during the life of T. died, and it was held, in D. P., that the administrator of such son was absolutely entitled to the leasehold estates, subject only to be defeated by the birth of a son of T. the prior tenant for life.

It is scarcely necessary to observe, that a bequest of a term for years

(*q*) 3 B. P. C. Toml. 141, 1736. This case seems to have escaped the research of Mr. Fearne. See also Backhouse *v.* Bellingham, Pollex. 33; Burgis *v.* Burgis, 1 Mod. 115.

(*r*) 3 B. P. C. Toml. 204. See also [Higgins *v.* Dowler, 1 P. W. 98]; Stanley *v.* Leigh, 2 P. W. 686; Sabbarton *v.* Sabbarton, Cas. temp. Talb. 55, 245; Gower *v.* Grosvenor, 3 Barn. 54; S. C., cit. in Daw *v.* Pitt, stated 1 Mad. 503; Phipps *v.* Lord Mulgrave, 3 Ves. 613; [Boydell *v.* Golightly, 14 Sim. 327; Lewis *v.* Hopkins, 3 Drew. 668, 6 H. L. Cas. 1013 (Williams *v.* Lewis.)

Such gifts may be made defeasible on a collateral event.

or other personal property in the language of an estate tail, may be made defeasible on a collateral event in the same manner as any other bequest carrying the whole interest. Thus, a legacy to A and the heirs of his body, and if he die without issue, *living B*, to C, is clearly a good executory gift to C. (*s*)

Effect of act 1 Vict., c. 26, § 29, on this rule of construction.

And here it occurs to remark that the enactment (*t*) restricting words denoting a failure of issue to a failure at the death (which we have seen prevents them having the effect of creating an estate tail by implication) will, when applied to personalty, operate to restrain such words from passing the absolute interest, and also to bring within the compass of the rule against perpetuities the ulterior bequest depending on such contingency. If, therefore, a testator, by a will made or republished since 1837, bequeaths personal estate to A, and in case he shall die without issue then to B, A will not take the absolute interest (as formerly), from the ulterior gift being void; but A will take a vested interest in the personalty so bequeathed, defeasible in favor of B, on his (A's) leaving no issue at his death.

Where the bequest is to A expressly for life, and in case of his dying without issue to B, the construction seems also free from doubt. A will, according to the newly-enacted doctrine, take a life interest in *any* event, and B will take the ulterior interest, only in the event of A's leaving no issue; in the converse event of A leaving issue, the ulterior interest will be undisposed of. [But if after the express gift for life the limitation over be in case of A dying without "heirs of his body," the enactment will not apply, (*u*) and A will, it should seem, be absolutely entitled as before.] (*x*)

As to annexing personal to real estate, devised in strict settlement.

III.—When it is intended that leasehold estates, or personal chattels in the nature of heirlooms, shall go with lands devised *in strict settlement, they should not be simply subjected to the same limitations; the effect of that being to vest the personal property absolutely in the first tenant in tail, though he should happen to die within an hour after his birth; (*y*)

(*s*) Lamb *v.* Archer, 1 Salk. 225.

(*t*) *Ante* p. *493.

(*u*) *Ante* p. *533.

(*x*) *Ante* p. *571, as in Boden *v.* Watson, (or Lord Galway,) Amb. 398, 478, 2 Ed. 297.

(*y*) But where a junior branch, *quoad* the estate, has issue before the senior, the chattels do not vest indefeasibly in such issue, Hogg *v.* Jones, 32 Beav. 45.]

and, as the freehold lands in that event pass over to the next remainder-man, a separation between them and the chattels takes place; but the personal property should be limited over, in case any such tenants in tail (being the sons of persons *in esse*) should die under twenty-one and without inheritable issue, to the person upon whom the freehold lands will devolve in that event; or, which is the more usual mode, the personalty should be subjected to the same limitations as the freeholds, with a declaration that it shall not vest absolutely in any tenant in tail [by purchase] until twenty-one, or death under that age, leaving issue inheritable under the entail. Whether the courts are authorized to put this construction upon a direction that the chattels shall go with the lands so long as may be, or so long as the rules of law will permit, has been *vexata quæstio*. Lord Hardwicke, in Gower *v.* Grosvenor, (*z*) expressed an opinion in the affirmative, but in Foley *v.* Burnell, (*a*) and Vaughan *v.* Burslem, (*b*) Lord Thurlow held that the property vested absolutely in the tenant in tail on his birth; [*i. e.*, that the direction did not make the trust executory; and this, though often regretted, is now the settled doctrine.] (*c*) It was much canvassed in D. P. in Duke of Newcastle *v.* Countess of Lincoln, (*d*) which arose on marriage articles [containing a covenant to assign leaseholds upon the same trusts as freeholds so far as the law would allow, and the trusts being executory, it was decided that the court had power to modify the limitations so far as to suspend the absolute vesting until twenty-one.] Lord Eldon [did not concur in this decision], considering that the question was concluded by Vaughan *v.* Burslem. [But in Shelley *v.* Shelley, (*e*) where a testatrix, without reference to any real *estate, bequeathed jewels to her nephew to be held as heirlooms by him and by his eldest son on his decease, and so on from eldest son to eldest son, as far as the rules of law would permit,

By direct gift.

(*z*) 3 Barnard. 54. See also Trafford *v.* Trafford, 3 Atk. 347.

(*a*) 1 B. C. C. 274.

(*b*) 3 B. C. C. 101.

[(*c*) Fordyce *v.* Ford, 2 Ves., Jr., 536; Carr *v.* Lord Errol, 14 Id. 478; Stratford *v.* Powell, 1 Ba. & Be. 1; Rowland *v.* Morgan, 6 Hare 463, 2 Phil. 764; Doncaster *v.* Doncaster, 3 K. & J. 26. See also the cases reviewed by Wood, V. C., Lord Scarsdale *v.* Curzon, 1 J. & H. 40; per Lords Westbury and Cairns, L. R., 5 H. L. 101, 107.]

(*d*) 3 Ves. 387, 12 Ves. 218.

[(*e*) L. R., 6 Eq. 540. The point does not appear to have been previously decided. See opinion of Sir L. Shadwell, Boydell *v* Golightly, 14 Sim. 346; and see observations bearing on the question, 14 Ves. 487; 2 Phil. 771; 1 Ba. & Be. 25; 1 J. & W. 574, *ante* p. *352; 1 J. & H. 51; Doncaster *v.* Doncaster, 3 K. & J. 26.

and requested her nephew by his will or otherwise to give effect to her wishes, Sir W. P. Wood, V. C., held this to be a good executory trust, and directed a settlement to be made of the jewels to the nephew for life, remainder to his eldest son E. (who was born in the testatrix's lifetime) for life, remainder to E.'s eldest son if living at E.'s death, (*f*) to vest at twenty-one, with a gift over on death under twenty-one or in E.'s lifetime.

Ordinary form of trust for annexing chattels to settled realty.

To return to the case of a direct trust or bequest. Notwithstanding the provisions recommended above, a separation of the chattels from the lands will nevertheless occur (whichever form is used) if the tenant in tail should die under twenty-one leaving inheritable issue; for in that case he would take the chattels absolutely, while the lands would descend to the issue. To prevent this separation, the declaration should be that the chattels shall not vest absolutely in any tenant in tail by purchase who may die under twenty-one, but shall at his death devolve as nearly as possible in the same manner as the lands. (*g*) Under this (which is now the ordinary) declaration the issue will take the whole of the chattels by purchase, instead of such share or interest only as he may be entitled to as of kin to the ancestor.

When not void for remoteness.

That the words "by purchase" are necessary in this form of declaration, in order to avoid a breach of the rule against perpetuity, has already been noticed. (*h*) The effect of them is well illustrated by Gosling *v.* Gosling, (*i*) where freeholds were devised in strict settlement, and chattels were then given on the same trusts and for the same estates as the freeholds, or as near thereto as the law would permit, with a proviso that the chattels should not vest absolutely in *any* tenant in tail unless he attained twenty-one (without more.) These trusts were impugned as constituting in effect a gift to such tenant in tail only as should attain

Gosling v. Gosling.

(*f*) "Living at E.'s death" seems to be due to the words of the will "on his decease, and so on."

(*g*) Davidson's Common Forms, p. 216. The older forms (several of which are collected in Harrington *v.* Harrington, L. R., 5 H. L. 93, n.,) appear not to have contained an express gift over, but to have left the chattels set free by the divesting clause to be dealt with by the prior general trust. But whether this would be as efficacious as the express gift over is questionable; see the difference of opinion, Harrington *v.* Harrington, L. R., 3 Ch. 573, 5 H. L. 102. And see 1 Powell Dev. 732, n. by Jarman.

(*h*) Vol. I., p. *274.

(*i*) 32 Beav. 58, 1 D., J. & S. 1, and (Christie *v.* Gosling), L. R., 1 H. L. 279. See also Martelli *v.* Holloway, L. R., 5 H. L. 553.

twenty-one, and as therefore being too remote, as upon that construction *they clearly were; (l) and Sir J. Romilly, M. R., adopting that construction, held the gift void. But Lord Westbury differed on the point of construction and reversed the decision. Applying the limitations of the freeholds to the personal estate, (as far as the difference of tenure would admit,) the effect was (he said) to give the absolute interest to the first tenant in tail by purchase: no other tenant in tail could by possibility become entitled *under the limitations*, since the first took absolutely. Then came the proviso, in which the words "tenant in tail" *must* mean tenant in tail by purchase, for it referred to one in whom the personalty would, but for the proviso, have vested absolutely instead of defeasibly. The L. C. therefore held the gift vested in the infant tenant in tail, liable to be divested on his death under twenty-one. And this was affirmed in D. P. It turned on the question whether the proviso postponed the original vesting or qualified a previously-vested gift. Lord St. Leonards held with Lord Romilly that the former was the true construction: but Lords Chelmsford and Cranworth agreed with the L. C. in preferring the latter; and (as observed in a subsequent case (m) by Lord Cairns) when once this construction was arrived at, all difficulty was at an end, and the bequest was in no way obnoxious to the rule against perpetuity.

But Lord Westbury observed, "If the will had provided for the event of a tenant in tail by purchase dying under twenty-one leaving a son, by declaring an express trust for such son of the personal estate, the case would have existed of a tenant in tail of the real estates *by descent* taking the personal estate by purchase; and if in that case the proviso (*i. e.*, the proviso postponing the vesting) were held to apply to and include such tenant in tail the whole disposition of the principal of the personal estate would be void for remoteness." Here, he thought, no such trust was either expressed or implied. (n) But this is, in effect, what the ordinary declaration does express. Hence the necessity for the words "by purchase." The trust in Gosling *v.* Gosling was saved from remoteness only because it led to the very separation which the ordinary declaration is designed to prevent; it being considered by Lord Westbury (o) that if the infant tenant in tail should die under twenty-one leaving issue, the chattels would devolve

(l) See vol. I., p. *273.

(m) Harrington *v.* Harrington, L. R., 5 H. L. 103.

(n) 1 D., J. & S. 16.

(o) Ib. This point was not noticed in D. P.

under the prior trust to the next purchaser in the series of limitations, not to the issue.

How far remoteness obviated by words "so long as the law permits."

*The words "so long as the rules of law will permit," though ineffectual to make the trust executory, or to correct a gift which in terms infringes the rule against perpetuity, (p) may, it seems, fairly be referred to where the terms are ambiguous, in aid of a construction which will not be obnoxious to that rule. (q) And even without these words, if the trust is on other grounds executory, it may be moulded to avoid remoteness. Thus, in Miles v. Harford, (r) where freeholds were devised to A for life, remainder to his first and other sons in tail male, with a shifting clause which provided that if A *or his issue male* should become entitled to a certain other estate, the devised estate should go over; and leaseholds were given upon such trusts, &c., as, regard being had to the difference of tenure, would most nearly correspond with the uses, &c., of the freeholds. It was held by Sir G. Jessel, M. R., that this was an executory trust; for the testator "knew that something would not work, and has said you are to make them correspond, having regard to the effect of the tenure on the limitations." If you repeated the shifting clause literally for the leaseholds, it would fail to a great extent for remoteness. It must therefore be modified so as to shift the leaseholds in every case (covered by the clause) in which it could lawfully be made to shift. (s)

Other forms of trust.

Other forms seek to postpone a separation of the chattels from the land by restricting the interest in the chattels to those who come into actual possession of the land; (t) still taking care

(p) See Tollemache v. Earl of Coventry, 2 Cl. & Fin. 611, 8 Bli. 547, *ante* vol. I., p. *276.

(q) See Harrington v. Harrington, L. R., 3 Ch. 574, 5 H. L. 102, 107.

(r) 12 Ch. D. 691.

(s) As it happened, A himself had become entitled to the other estate, and the M. R. also held that, as this event was separately expressed from that of his issue becoming so entitled, the shifting clause was good in event, as to the leaseholds, without modification. See vol. I., p. *285.

(t) See Potts v. Potts, 2 Jo. & Lat. 353, 1 H. L. Cas. 671 ("become seized"); Scarsdale v. Curzon, 1 J. & H. 40 ("seized of or entitled to the *actual* freehold"); Cox v. Sutton, 25 L. J., Ch. 845, 2 Jur. (N. S.) 733 (repairing fund to be applied at request of person in possession.) But on the context "entitled in possession" has been held to mean one whose personal qualifications (*e. g.*, age) entitle him to the possession, subject to preceding estates, Holloway v. Webber, Martelli v. Holloway, L. R., 6 Eq. 523, 5 H. L. 532, per Stuart, V. C., and Lords Hatherley and Westbury; see also Foley v. Burnell, 1 B. C. C. 274, 4 B. P. C. Toml. 319; In re

not to postpone the ultimate vesting of them beyond the limits allowed by the rule against perpetuity.]

Johnson's Trusts, L. R., 2 Eq. 716. And where the entail has been barred by a prior tenant for life and remainderman in tail, the words "who shall be in the actual possession" have been held to mean the person who would have come into possession if the original limitations were subsisting, Hogg v. Jones, 32 Beav. 45.]

*CHAPTER XLV.

WHAT WORDS WILL CHARGE REAL ESTATE WITH DEBTS AND LEGACIES.

I. *Liability of Real Estate to Simple Contract Debts.—Whether charged by a general Direction in a Will that Debts shall be paid.—Distinction where a specific Fund is appropriated;—where the Direction is to Executors, being or not being Devisees.—Whether Legacies chargeable by same Words as Debts, &c.*

II. *Whether Direction to raise Money out of Rents and Profits authorises a Sale.*

Sketch of the law as to real estate being assets.

I.—By the common law of England the real estate of a deceased person was not liable to answer his simple contract debts, no action being maintainable against the heir in respect of descended assets, except by creditors whose debts were constituted by an instrument under seal, *i. e.*, a specialty obligation; and not even then, unless an intention to charge the heir of the debtor were distinctly indicated: and the claim of a specialty creditor did not extend to copyholds (*a*); nor did it extend to devised freeholds, until the act 3 and 4 W. & M., c. 14, gave a right of action against the devisee of the debtor, concurrently with the heir, to a certain class of specialty creditors, namely, those whose demands were recoverable by an action of debt. (*b*) [But even these were held to have no remedy under the act where there was no heir, the remedy provided being against the heir and devisee jointly.] (*c*) [1]

(*a*) Parker *v.* Dee, 2 Ch. Cas. 201.

[(*b*) Wilson *v.* Knubley, 7 East 128; Coope *v.* Cresswell, L. R., 2 Ch. 112; extended to action of covenant by 1 Will. IV., c. 47.

(*c*) Wilson *v.* Knubley, 7 East 128; Hunting *v.* Sheldrake, 9 M. & Wel. 256. The act 1 Will. IV., c. 47, supplied a remedy against the devisee *alone*.]

1. In Quinby *v.* Frost, 61 Me. 77, 81, Kent, J., says: "A testator may order his debts and the expenses of administration to be paid out of his personal, or out of his real estate or out of both, or out of any particular piece or parcel. When he makes no distinct provision as to the spe-

The first relaxation of this rigid doctrine (so adverse to the policy of a great commercial country) was the act 47 Geo. III, c. 74, which let in the claims of the simple contract creditors of a deceased person upon the real assets, *i. e.*, the freehold estates, if the debtor was at the time of his decease (*d*) subject to the bankrupt laws. This act was the fruit of the persevering exertions of Sir Samuel Romilly, whose labors in this righteous cause are well known, and was all that those exertions were able *to wring from the legislature of that day. But what was denied to the zealous advocacy of this able and upright lawyer, was conceded, without, it is believed, a dissentient voice, by the parliament of William IV.,—a striking illustration of the change which public opinion had undergone on this subject. The act 3 and 4 Will. IV., c. 104, provided that after the 29th of August, 1833, when any person should die seized of or entitled to any estate or interest in lands, tenements or hereditaments corporeal or incorporeal, or other real estate, whether freehold, customaryhold or copyhold, which he should not by his last will have charged with or devised subject to the payment of his debts, the same should be assets, to be administered *in courts of equity*, for the payment of the just debts of such person, as well debts due on simple contract as on specialty; and that the heir-at-law, customary heir and devisees of such debtor should be liable to all the same suits *in equity* at the suit of any of the creditors, whether by simple contract or by specialty, as the heir-at-law or devisees were theretofore liable to in respect of freehold estates at the suit of creditors by specialty in which the heirs

Stat. 47 Geo. III., c. 74. See also 1 Will. IV., c. 47, § 9.

3 and 4 Will. IV., c. 104.

Real estates to be assets for payment of debts by simple contract.

cific kind of property, the general rule is understood to be that the debts shall be paid out of the personal property. But this rule is subject to the other well-established rule, that the will of the testator must govern, and that this will, or intention, may be gathered from the provisions of the whole testament, and may be inferred from the nature of the legacies, or devises, and the manifest object and purpose of the testator, and from all the circumstances of the case." Again it is said by Stephen, J., in Stevens *v.* Gregg, 10 Gill & J. 143, 147: "In equity it is well established, that the personal estate is the natural and primary fund for the payment of debts and legacies, even where they are expressly charged upon the real estate, descending or devised; and that the real estate is only to be resorted to as an auxiliary fund, after the personalty has been exhausted. For this unquestionable principle, if authority be necessary to support it, see 2d Johns. C. R. 628, where Chancellor Kent says, the personal estate is the proper fund to pay debts and legacies, and *in general*, it is first to be applied, though the real estate may be charged."

(*d*) Hitchon *v.* Bennett, 4 Mad. 180.

Priority reserved to specialty creditors,

were bound. (e) A proviso was added that in the administration of assets by courts of equity *under the act*, creditors by specialty in which the heirs were bound, were to be paid in full before creditors by simple contract, or by specialty in which the heirs were not bound; (f) [but by stat. 32 and 33 Vict. c. 46, these distinctions are wholly abolished; and all creditors whether by specialty or simple contract of persons dying after 1869 are payable *pari passu* out of his assets, whether these be legal or equitable. (g) The rights of secured creditors were expressly saved; (h) but in the administration by the court of the estate of an insolvent debtor dying on or after 1st November, 1875, these rights are now subject to the rule in bankruptcy.] (i)

—since abolished.

Difference of effect between enactment and actual charge.

During the period when real estate was not liable, unless charged by its deceased owner, to pay his simple contract debts, of course it was a question of importance (and sometimes too of no small difficulty) to determine whether such charge were in *point of fact created by the will of the debtor. [But the combined effect of the acts of Will. IV., and Vict. being to put all creditors whether by specialty or simple contract on an equal footing (k) the importance of the question is much diminished; since this was always the rule of equity under a general charge; and although there are other classes of creditors (l) whose priorities are untouched, they rarely come in question. One distinction however remains, viz.] that under the statutes the creditors have not (as in the case of an actual charge) any lien on the estate. (m) If, therefore, it is parted with by the heir or devisee before the creditor has pursued his remedy, the

[(e) The latter clause did not narrow the previous (charging) clause so as to exclude the case of a debtor dying without an heir, Evans v. Brown, 5 Beav. 114; Hughes v. Wells, 9 Hare 749.

(f) Richardson v. Jenkins, 1 Drew. 477.

(g) 32 and 33 Vict., c. 46. Arrears of rent are a specialty debt within this act, In re Hastings, 6 Ch. D. 610. As to the distinction between legal and equitable assets, see ch. XLVI., § 1.

(h) As to their rights generally, see Mason v. Bogg, 2 My. & Cr. 443. Right of distress for rent does not make rent in arrear a secured debt, In re Coal Consumers' Association, 4 Ch. D. 625.

(i) 38 and 39 Vict., c. 77, § 10: see Sherwin v. Selkirk, 12 Ch. D. 68.

(k) So that now judgment against the executor by a simple contract creditor gives him priority over specialty creditors, Williams v. Williams, L. R., 15 Eq. 270, provided it be obtained before decree for administration, Parker v. Ringham, 33 Beav. 535.

(l) See Wms. Ex'rs, p. 995, *seq.* (8th ed.).]

(m) 4 My. & Cr. 268. [See also Spackman v. Timbrell, 8 Sim. 253; Richardson v. Horton, 7 Beav. 112; Pimm v. Insall, 1 Mac. & G. 449.]

estate cannot be followed; though the creditor's lien under an actual charge is of no great value to him, since it does not prevail against a *bona fide* purchaser for a pecuniary consideration; the well-known rule being that such purchasers are not bound to see their money applied in payment of debts under a general charge. (*n*) Hence it is obvious that the inquiry whether real estate is or is not charged with debts by certain expressions in a will is not wholly precluded even in regard to the wills of testators dying since 1869.

General direction that debts shall be paid.

Whether a general direction by a testator that his debts shall be paid charges the real estate with the payment, is a point which has been much agitated from an early period.[2] (*o*)

(*n*) Sug. V. & P. (14th ed.) 655. And where debts and legacies are charged, the exemption extends to both, and even, it seems, to annuities, [Page *v.* Adam, 4 Beav. 269, cit. 1 D., M. & G. 650.]

2. Where a devise follows a direction that "all my just debts shall be paid previous to distribution," a charge is created, Darrington *v.* Borland, 3 Port. (Ala.) 9; so, after a direction to pay debts, a devise

What is included in a charge of "debts."—[(*o*) Under a charge of "debts" in a will are included all liabilities to which the personal estate is liable; as, damages for a breach of covenant occurring after the testator's death; see Earl of Bath *v.* Earl of Bradford, 2 Ves. 587; Lomas *v.* Wright, 2 My. & K. 769; Willson *v.* Leonard, 3 Beav. 373; Morse *v.* Tucker, 5 Hare 79; Eardley *v.* Owen, 10 Beav. 572; Bermingham *v.* Burke, 2 J. & Lat. 699. So, a sum covenanted to be left by *will*, (which is a specialty debt,) Eyre *v.* Monro, 26 L. J., Ch. 757; and the liability of an incumbent's estate for dilapidations, see Bisset *v.* Burgess, 23 Beav. 278. The act 3 and 4 Will. IV., c. 104, is equally extensive, Ex parte Hamer, 2 D., M. & G. 366. A charge of debts in an English will was held to include a debt secured by heritable bond on a Scotch estate, Maxwell *v.* Maxwell, L. R., 4 H. L. 506. As to mortgage debts, see ch. XLVI., § 2, *ad fin.* Debts barred by the statute of limitations are not included, Burke *v.* Jones, 2 Ves. & B. 275. A claim, though not statute-run, may forfeit the benefit of a charge by laches, Harcourt *v.* White, 28 Beav. 303. But a direction to deduct from a child's share "debts" owing by her to the other children was held to include statute-run debts, the object being to make equal distribution, Poole *v.* Poole, L. R., 7 Ch. 17. If a devise for payment of debts does not provide for such payment in a practicable manner, it is within the statute of fraudulent devises, Hughes *v.* Doulbin, 2 Cox 170. A charge of the debts of another person then deceased, includes all his debts not barred at *his* death, O'Connor *v.* Haslam, 5 H. L. Cas. 170. But *qu.*, whether a charge of the debts of one who survives the testator would include debts contracted after the testator's death unless (as in Joel *v.* Mills, 7 Jur. (N. S.) 389, 30 L. J., Ch. 354) the trustees have a discretion. Whether the charge entitles creditors of the third person to interest depends on the terms of the will, Askew *v.* Thompson, 4 K. & J. 620; Poole *v.* Poole, *sup.* A charge of debts on one part of the *personalty* is confined to debts proper, Hawkins *v.* Hawkins, 13 Ch. D. 470.]

*In an anonymous case in Freeman, (p) it was held that the land was *not* charged in such cases; "for, if that should be so, the debts of every testator would be charged upon his land,

Cases in which lands held *not* to be charged.

"subject to the deductions mentioned," Bell v. Raymond, 20 Conn. 338; so, in a devise, "after my debts are paid," or "my debts and devises being first paid," with power to sell for debts, Alexander v. McMurry, 8 Watts 504; Steel v. Henry, 9 Id. 523.

Where lands are devised to different persons in separate parcels, and it becomes necessary to sell the lands of testator to pay debts, the debts will be a charge on all the lands, and must be raised out of all such lands in proportion to their respective values, Green v. Green, 69 N. C. 25.

A devise to A of all testator's real and personal property, "he paying" debts and legacies, makes them a charge, West Branch Bank v. Donaldson, 7 Watts & S. 407; Tower's Appropriation, 9 Id. 103; Baylor v. Dejarnette, 13 Gratt. 152; Little v. Hager, 67 N. C. 135. A devise to A, "he paying" testator's debts "out of the estate given to him," creates a charge, Gardner v. Gardner, 3 Mason C. C. 178; Dodge v. Manning, 1 N. Y. 298; Randolph's Appeal, 5 Penna. St. 242; Hoover v. Hoover, Id. 351; or certain yearly sums, Hellman v. Hellman, 4 Rawle 440; or "to his younger brother £100," Luckett v. White, 10 Gill & J. 480; or "he paying out of my estate" certain legacies, Taft v. Morris, 4 Metc. 523; Tole v. Hardy, 6 Cow. 333; Swoope's Appeal, 27 Penna. St. 58; or "he to pay," Decker v. Decker, 8 Ohio 157; Nellons v. Truax, 6 Ohio St. 97; or with direction to support the testator's daughter, Veazey v. Whitehouse, 10 N. H. 409; Leavitt v. Wooster, 14 Id. 550; or provided he charges himself with the payment of a certain legacy, Dobbins v. Stevens, 17 Serg. & R. 13; or with proviso that he "pays in consequence of the great value of the lands," &c., Morancey v. Quarles, 1 McLean C. C. 194; or "provided he pay," Skillman v. Van Pelt, Saxt. (N. J.) 511; Birdsall v. Hewlett, 1 Paige 32; Downer v. Downer, 9 Watts 63; Ruston v. Ruston, 2 Dall. 242; or "in consideration of the devise to A I order him to pay," &c., Sands v. Champlin, 1 Story C. C. 376; or "after paying" a legacy, Hanna's Appeal, 31 Penna. St. 53; or "after my debts and funeral charges are paid," Fenwick v. Chapman, 9 Pet. 461; Wood v. Wood, 26 Barb. 356; or subject to the payment of debts, Clyde v. Simpson, 4 Ohio St. 445; so where there is a direction that the devisee pay certain legacies, and a residuary devise to him after debts and legacies are paid, Harris v. Fly, 7 Paige 421. So where, after a devise to E. P., was added "and it is also understood that said E. P. is to pay, &c., within one year $200," Powers v. Powers, 28 Wis. 659. And, in such case, the devisee having accepted the land devised, he will hold it in trust for the legatee of the $200 until the same be paid, Ib.

But a mere direction that a devisee pay a certain sum will not make it a charge on the lands devised, where that is neither expressed nor necessarily implied, Wright v. Denn, 10 Wheat. 204; Miltenberger v. Schlegel, 7 Penna. St. 241; Hamilton v. Porter, 63 Id. 332; Buchanan's Appeal, 72 Id. 448; Brandt's Appeal, 8 Watts 198; nor "if A choose to accept the devise, he is to pay," Wright's Appeal, 12 Penna. St. 256; Dewitt v. Eldred, 4 Watts & S. 414; but see Solliday v. Gouver, 7 Penna. St. 452. There must be a direction that the debt or legacy be *first* paid, Chancellor Kent in Lupton v. Lupton, 2 Johns. Ch. 623. See, however, Kelsey v.

(p) Freem. Ch. Cas. 192.

for there are but few wills but have some such expressions, whereby the testator desires his debts to be paid." 3

A similar doctrine was propounded in Eyles *v.* Cary; (*q*) but it seems to be irreconcilable with that of numerous other early authorities, in which a direction for the payment of debts generally, or (though this is certainly stronger) for

Expressions which have been held to charge.

Deyo, 3 Cow. 133, where a charge of legacies was held to be necessarily implied from a devise of all testator's real estate to A, with direction that he "or his heirs" pay certain legacies, "half after my death and half two years after my wife's death," such devise being preceded by a gift of all his personalty to his wife, with direction that his debts be paid out of his personal property. So, too, a charge of debts where the whole estate is given to W., who, "in consideration thereof," is to pay, &c., Hill *v.* Huston, 15 Gratt. 350. So, too, where the estate is given "on condition of payment," &c., Bugbee *v.* Sargent, 23 Me. 269.

Where land was devised to testator's wife for life, and after her death to be equally divided between testator's children, "after defraying her funeral expenses and paying her just debts," the debts were charged only upon the land of testator in which his wife had the life estate, Harkins *v.* Hughes, 60 Ala. 316.

3. In Harris *v.* Douglas, 64 Ill. 466, 472, Scott, J., said: "At common law, the real estate of a deceased person was not liable to the payment of his simple contract debts; the devisees took the land bequeathed discharged therefrom. It was according to the principles of natural justice that a man should be honest, and pay his debts. The courts being anxious to promote justice, from an early period endeavored to give effect to a general direction by a testator for the payment of all his debts, by construing it into a trust for their discharge out of his real estate, in case of a deficiency of the personalty for that purpose. Even the slightest allusion to debts in any part of the will was sometimes held sufficient to charge the real estate, on the supposition that the testator would have said nothing about the debts had he not intended to charge his lands. Otherwise he would have left them to be discharged as the law directs. The general doctrine, however, was, that a mere direction in the will to pay debts and legacies did not create a charge on the real estate. It was necessary that some clear intention should be expressed that the devisee should take the real estate charged with their payment."

In Gaw *v.* Huffman, 12 Gratt. 628, 633, Moncure, J., said: "The will of Robert Gaw does not charge his real estate with the payment of his debts. Whether such a charge is created by a will, is always a question of intention depending upon the construction of the whole will. It is so natural to suppose that a man in that solemn act intended to be just, that courts have taken very slight words in a will to imply a charge upon lands. Carr, J., in Downman *v.* Rust, 6 Rand. 587, 'Courts of equity (said Lord Lyndhurst) have always been desirous of sustaining charges by implication for payment of debts, and the presumption in favor of them is not to be repelled by anything short of clear and manifest evidence (from the will) of a contrary intention.' Price *v.* North, 1 Philips R. 85. It has therefore been established, as a general rule, that a direction by a testator that his debts shall be paid, charges them by implication on his real estate, either as against his heir-at-law or devisee."

(*q*) 1 Vern. 457, 1 Eq. Cas. Ab. 198, pl. 3.

the payment of them *out of the testator's estate*, has been held to onerate the real estate devised by the will.

"*My debts being first deducted*, I devise all my estate," &c.

Thus, in Newman *v.* Johnson, (*r*) where the testator said, "*My debts and legacies being first deducted*, I devise all my estate, both real and personal, to J. S.;" Lord Nottingham held that it amounted to a devise to sell for payment of debts.[4]

"First, I will that all my debts be paid," "also I devise," &c.

So, in Bowdler *v.* Smith, (*s*) where a testator devised as follows:—"*As to my temporal estate wherewith God hath blessed me, I give and dispose thereof as followeth: First, I will that all my debts be justly paid which I shall at my decease owe;* also I devise all my estate in G. to A." This was all the real estate the testator had; and it was held that the will charged it with the debts.

Similar expression.

And in Trott *v.* Vernon, (*t*) where a testator devised in these words:—*Imprimis, I will and devise that all my debts, legacies and funeral expenses shall be paid and satisfied in the first place:* Item, I give and devise;" and then proceeded to dispose of his real and personal estate: Lord Cowper held that the testator having willed his debts, &c., to be satisfied in the first place, these words must be intended to give a preference to those purposes to any other whatever; and he held the real estate to be charged.

"As to my worldly estate, *my debts being first satisfied*," &c.

Again, in Harris *v.* Ingledew, (*u*) where the testator said, "As to my worldly estate, *my debts being first satisfied*, I devise the same as follows," and then proceeded to devise certain freehold *and leasehold lands; Sir J. Jekyll, M. R., held that nothing was devised until the debts were paid. He thought it would have been sufficient though the word "first" had been omitted.

Lands charged under general direction, though particular

So, in Hatton *v.* Nichol, (*x*) where the testator commenced his will thus:—"As to the worldly estate with which it hath pleased God in his abundant goodness to bless me, I give devise and dispose thereof as followeth: *Imprimis, I will*

(*r*) 1 Vern. 45, 1 Eq. Cas. Ab. 197, pl. 1. And see Harris *v.* Ingledew, 3 P. W. 91; Davis *v.* Gardiner, 2 P. W. 187.

4. So, too, a devise of his whole estate, to be divided "as soon as my debts and legacies are paid," and "not until then," constitutes a charge, Hall *v.* Hall, 2 McCord Eq. 269.

(*s*) Pre. Ch. 264. See also Coombes *v.* Gibson, 1 B. C. C. 273.

(*t*) Pre. Ch. 430, 2 Vern. 708, 1 Eq. Cas. Ab. 198, pl. 6. See also Beachcroft *v.* Beachcroft, 2 Vern. 690.

(*u*) 3 P. W. 91. [See also King *v.* King, Id. 358.]

(*x*) Cas. temp. Talb. 110.

that the charges of my funeral and all debts which shall be owing by me at the time of my death be justly paid and satisfied, especially that due to my poor carriers, which I will shall be discharged out of the first *money* of mine that shall be received;" and then he proceeded to devise his real estate to certain uses. Lord Talbot held that the debts were well charged upon the real estate.

debts were to be paid out of the first "*money*" that was received.

Again, in Stangor *v.* Tryon, (*y*) where the words were, "*In the first place I will that all my just debts and funeral expenses be fully paid and satisfied;*" and the testator then devised copyhold lands: Sir T. Sewell, M. R., held the copyholds liable to the debts. Kay *v.* Townsend, (*z*) decided about the same period, is to the same effect.

"In the first place I will that all my just debts," &c., be paid.

In Legh *v.* Earl of Warrington, (*a*) a testator thus commenced his will:—"As to my worldly estate which it hath pleased God to bestow upon me, I give and dispose thereof in manner following; that is to say, *Imprimis*, I will that all my debts which I shall owe at the time of my decease be discharged and paid *out of my estate;*" (*b*) 5 and he then proceeded to dispose of his real and personal estate, expressly charging the former with an annuity. It was contended that these were merely the usual introductory words, and did not indicate an intention to charge the real estate;

Debts to be paid "*out of my estate.*"

(*y*) See Mr. Raithby's note to Trott *v.* Vernon, 2 Vern. 709.

(*z*) Ibid.

(*a*) 1 B. P. C. Toml. 511.

(*b*) These words are added from Belt's Suppl. to Ves. 361.

5. A direction that A "be supported out of my estate," creates a charge, Sheldon *v.* Purple, 15 Pick. 528; and see Ripple *v.* Ripple, 1 Rawle 386; so a legacy "to be paid out of my estate," Taylor *v.* Dodd, 58 N. Y. 335; Bray *v.* Lamb, 2 Dev. Eq. 372; Biddle *v.* Carraway, 6 Jones Eq. 95. But where a testator directed a legacy to be paid "out of the estate," and devised property to another without mention of any charge upon it, none was created, Brookhart *v.* Small, 7 Watts & S. 229. Where an estate less than fee is given to A, and a legacy to B, "to be paid by A out of the estate given to him," it is a charge not upon the land, but upon the devisee's estate in the land, Wallington *v.* Taylor, Saxt. (N. J.) 314. See also Jackson *v.* Atwater, 19 Hun 627. But see Quick *v.* Quick, Saxt. 4; Sadd *v.* Carter, Pre. Ch. 29, 2 Eq. Cas. Abr. 370; Pawlett *v.* Perry, 4 Vin. Abr. 461, 2 Eq. Cas. Abr. 497. And where there are specific legacies and a residuary clause, a legacy charged "upon my estate generally," is a charge upon the residue only Davenport *v.* Hassell, Busbee Eq. 29. But where the expression in the will was, "It is my will and desire that my just debts be paid *out* of my estate," &c., it was held that the debts were not thereby charged upon the real estate, Gaw *v.* Huffman, 12 Gratt. 628.

Where testator gave his personal estate to provide for aged relatives for life, and ordered his debts paid *out* of his estate, and the debts were nearly equal to the personalty, it was held that this manifested an intention to charge the realty, Quinby *v.* Frost, 61 Me. 77.

but the House of Lords, affirming a decree of Lord King, held the real estate to be charged.

This case has always been regarded as a leading authority. It was recognized by Lord Hardwicke in Earl of Godolphin *v.* Penneck, (*c*) and by Lord Loughborough in Williams *v.* Chitty. (*d*)

Simple direction that "debts be in the first place paid."

So, in Kentish *v.* Kentish, (*e*) where the testator said, "*First, I will that all my just debts shall in the first place be paid and satisfied.* Item—I give and bequeath;" and went on to devise his real estate; Buller, J., held it to be charged.

Lord Alvanley's opinion of the effect of a general direction.

*In Kightley *v.* Kightley, (*f*) too, Sir R. P. Arden, M. R., assumed that debts were charged on the real estate by the words, "First, I will and direct that all my legal debts, legacies and funeral expenses shall be fully paid and satisfied," which were followed by a direction to the testator's executors about his funeral, and a devise of his lands. But the legacies, (*g*) he held, were not charged by these words.

"After payment of my just debts," &c., "I bequeath," &c.

So, in Shallcross *v.* Finden, (*h*) where a testator began his will thus:—"*After payment of my just debts, funeral expenses and the expenses of the probate hereof,* (*i*) as likewise of my testamentary articles I give and bequeath unto" H. £59, "and as to such expectancies in fee," &c.; and the testator then proceeded to devise his interest in certain lands; Sir R. P. Arden, M. R., held that the real estate in question was charged with the debts. The words "after payment of my debts," he said, meant that the testator would not give anything until his debts were paid.

With singular inconsistency, however, the same judge in Hartley *v.* Hurle, (*k*) assumed, in the discussion of another question, that a general direction by a testator that his debts, funeral and testamentary expenses should be paid, was a direction *to his executors,* the persons who take the personal estate, to pay them.

In Williams *v.* Chitty, (*l*) a testator ordered and directed *all his just*

(*c*) 2 Ves. 271. As this case is rather loosely stated, and seemed very little to illustrate the general doctrine, it has been omitted.

(*d*) 3 Ves. 552.

(*e*) 3 B. C. C. 257.

(*f*) 2 Ves., Jr., 328.

(*g*) As to the distinction between them, see *post,* this section, *ad fin.*

(*h*) 3 Ves. 738.

(*i*) For a similar expression, see Batson *v.* Lindegreen, 2 B. C. C. 94; Kidney *v.* Coussmaker, 12 Ves. 136, *post;* [Tompkins *v.* Tompkins, Pre. Ch. 397.]

(*k*) 5 Ves. 545.

(*l*) 3 Ves. 545.

debts and funeral expenses to be first paid; and then proceeded to devise his real estate. Lord Loughborough's first impression was that the real estate was not charged; but he ultimately came to a different conclusion upon the authorities, which he considered had established the rule, "that wherever there is mention of debts in a will, and that will devises real estate, that shall throw the debts upon the real estate." 6

Mere direction that debts, &c., should be paid.

Next in chronological order is Clifford *v.* Lewis, (*m*) where a testator commenced his will by saying, "I will and direct that my *just debts, funeral and testamentary expenses be paid and satisfied.*" He then, after some recitals, bequeathed an annuity to his wife, charging his real estate in certain counties therewith; and went on to dispose of the rest of the real and personal estate. Sir J. Leach, V. C., said, "The question is whether the expres*sion with which he has commenced his will imports a general and primary purpose that the payment of his debts, funeral and testamentary expenses should precede the subsequent dispositions which he has made of his property. In Finch *v.* Hattersley, (*n*) the will began thus: '*First*, I direct that my debts,' &c., 'be paid.' In Legh *v.* Warrington, '*Imprimis*, I direct my debts to be paid.' Both these wills must be read thus: '*In the first place* I direct my debts to be paid.' This testator has *in fact* first directed his debts to be paid; and I cannot attribute to him a different intention because *in the form of the expression* he has not remarked that it was *in the first place.*"

"I will that my just debts," &c., "be paid."

Sir J. Leach here seems to have treated the question before him as lying within a very narrow compass, namely, whether a direction inserted at the commencement of the will was equivalent to an express direction to pay "in the first place;" though it is not a little singular that on a subsequent occasion, (*o*) he referred to Clifford *v.* Lewis, as distinguished from the one before him by the circumstance, that the testator's debts were directed

Remarks upon Clifford *v.* Lewis.

6. But in Harris *v.* Douglass, 64 Ill. 466, it was held that such an expression created no charge. But see Funk *v.* Eggleston, 92 Ill. 515.

(*m*) 6 Mad. 33; [Bradford *v.* Foley, 3 B. C. C. 351, n.]

Circumstance of devisee being appointed executrix.—(*n*) Cit. 7 Ves. 210, stated 3 Russ. 345, n. The testator directed that his debts and funeral expenses [should be paid by his executrix,] and then devised his real estate to his wife for life, *whom he appointed executrix.* The circumstance of the devisee being appointed executrix was, in Powell *v.* Robins, 7 Ves. 211, considered by Sir W. Grant as the ground of the decision. See the case mentioned again, *post* p. *597.

(*o*) See Douce *v.* Lady Torrington, 2 My. & K. 600.

in the first place to be paid. In some of the early cases, reliance was undoubtedly placed on expressions of this nature; but most of them proceeded upon the broad ground that a general direction that debts should be paid with or without such concomitant expressions, and whatever was its position in the will, (*p*) charged the real estate. The words "in the first place," indeed, as here used, it is submitted, are merely introductory words of form, denoting the commencement of the testamentary act, (*q*) or, if they have any meaning, only denote the order of payment, not the fund out of which payment is to be made.

As to debts being directed to be paid "first," or in the first place.

Some stress certainly was laid on a phrase of this nature in the subsequent case of Ronalds *v.* Feltham, (*r*) where a testator commenced his will in these words: "First, I direct all my just debts and funeral expenses to be fully paid and satisfied;" and then proceeded to dispose of all his copyhold, freehold and leasehold estates and all his other property among his wife and children. Sir T. Plumer, M. R., held that the real estate was *charged, observing, in reference to the argument upon the word "first" in this will being nothing more than the ordinary technical form of introductory words, that here it was not followed by other words denoting succession, such as secondly, thirdly, &c.

But a more sensible view of this point was taken by Sir L. Shadwell in Graves *v.* Graves, (*s*) where he said, "I do not think that the charge is made to rest on the mere circumstance that the testator has used the words '*imprimis*' or 'in the first place;' for, if a testator directs his debts to be paid, is it not, in effect, a direction that his debts shall be paid in the first instance?"

In Irvin *v.* Ironmonger, (*t*) we have another instance of real estate being held to be charged by a general direction at the commencement of the will without the words "in the first place," and that too by Sir J. Leach, whose reliance on such words has been already the subject of comment; though he certainly does not appear to have uniformly maintained the efficacy of a general direction, as appears by Doucé *v.*

(*p*) That the position of such clauses is immaterial, see Ridout *v.* Dowding, 1 Atk. 419; Clark *v.* Sewell, 3 Atk. 96.

(*q*) See Beeston *v.* Booth, 4 Mad. 161.

(*r*) T. & R. 418.

(*s*) 8 Sim. 55.

(*t*) 2 R. & My. 531. [See also King *v.* Denison, 1 Ves. & B. 260, 274; Walter *v.* Hardwick, 1 My. & K. 396, 402.]

Lady Torrington, (u) where the testator, after directing all his just debts, funeral and other incidental expenses to be paid with all convenient speed after his decease, and confirming his marriage settlement, devised all his real estate to trustees (whom he also appointed executors) and their heirs, upon trust to pay his wife an annuity, and upon the further trusts therein mentioned. By a codicil the testator directed that his trustees should, out of the rents arising from one of his estates, pay his wife's annuity and also an annuity to his son, and apply the surplus in discharge of the simple contract debts owing by him (the testator.) One question was, whether the other estates were charged with the testator's debts by the effect of the general direction at the commencement of his will. Sir J. Leach, M. R., decided in the negative: he intimated the strong inclination of his opinion to be, that the introductory words had no such effect, but that it was unnecessary to decide the question upon that ground, as it was plain from the codicil that the testator did not intend a general charge upon his real estate, for by that codicil he directed the surplus only of a particular estate, after payment of the annuities, to be applied in payment of the simple contract debts.

Real estate held not to be charged by general introductory words.

Of this case, Sir L. Shadwell in Graves *v.* Graves (x) observed, that it seemed to have been an amicable decision and to have *been made without sufficient consideration. Indeed, so far as it denied effect to general introductory words, the case directly clashes with the preceding authorities, to which may now be added several more recent cases, which preclude all hesitation in affirming the rule to be, that, subject to the question presently noticed, a general direction to pay debts, in whatever part of the will contained, (y) operates to throw them on the testator's real estate.

Sir L. Shadwell's condemnation of Douce *v.* Lady Torrington.

Thus, in Ball *v.* Harris (z) a will which commenced with the follow-

(u) 2 My. & K. 600.

(x) 8 Sim. 56.

(y) *Ante* p. *588, n. (p).

(z) 8 Sim. 485, 4 My. & Cr. 264. In this case, and in Shaw *v.* Borrer, 1 Kee. 559, the doctrine that a general direction to pay debts charged them on the real estate was treated as too clear for discussion, the only contest being whether such a charge conferred an implied authority to sell on the person taking the legal estate subject to certain trusts, which was decided in the affirmative. [See also Gosling *v.* Carter, 1 Coll. 644; Mather *v.* Norton, 17 Jur. 309, 21 L. J., Ch. 15; Doe d. Jones *v.* Hughes, 6 Ex. 223. In this last case it was decided at law that a simple charge of debts did not give the executor not taking the legal estate a power of sale. Robinson *v.* Lowater, 17 Beav. 592, and Wrigley *v.* Sykes, 21 Beav. 337, are *contra;* and see Colyer *v.* Finch, 5 H. L. Cas. 905; Corser *v.* Cartwright, L. R., 7 H. L. 737; Sug. V. & P. 662, n. (14th ed.); Hayes

Recent cases in which real estate held to be charged by general words.

ing words—"First, I direct all my just debts, funeral and testamentary expenses and the charges of the probate of this my will to be paid;" and then contained pecuniary legacies and devises of real estate—was held by both Sir L. Shadwell and Lord Cottenham to charge the testator's real estate.

So, in Harding *v.* Grady (*a*) a similar construction was given by Sir E. Sugden to the following concluding passage in a will: "I desire that all my just debts be paid as soon as conveniently after my decease." In this case there was the peculiarity that the will embraced real estate only, but the Chancellor's remarks render it probable that his adjudication would have been the same if the will had included personalty.

So, in Parker *v.* Marchant, (*b*) Sir K. Bruce, V. C., treated it as clear that real estate was charged by the following words: "I direct in the first place all my debts to be paid;" the will then proceeding to dispose of personal, and ultimately of real estate.

General observations upon the cases.

Such, then, is the long line of cases in which it has been held that a general direction by a testator that his debts shall be paid charges them upon his real estate. Though certainly in some of the wills there were expressions which might fairly be considered to sustain the construction independently of any such doctrine, *it seems to be generally admitted that the courts have allowed their anxiety to prevent moral injustice by the exclusion of creditors, "and that men should not sin in their graves," to carry them beyond the limits prescribed by established general principles of construction; though Lord Alvanley's observation in Shallcross *v.* Finden, (*c*) that the restricting the direction to pay to personalty renders it nugatory, that being before liable, is not without weight.

Absence of any devise or mention of realty.

The only doubt which the preceding authorities admit of is, whether a general direction that debts shall be paid will throw them on real estate when contained in a will the dispositions of which are otherwise confined to personalty; for it is observable that in all the cases which have yet occurred the will appears to have embraced real estate.[7] The total absence of any devise

& Jarman Conc. Wills 564, (8th ed.,) and 2 Jur. (N. S.) part II., 68. But see now 22 and 23 Vict., c. 35, §§ 14 to 18; In re Clay and Tetley, W. N. 1880, p. 136.]

(*a*) 1 D. & War. 430.

(*b*) 1 Y. & C. C. C. 290; Shaw *v.* Borrer, 1 Kee. 559. See also Price *v.* North, 1 Phil. 85; [per Lord Cairns, Corser *v.* Cartwright, L. R., 7 H. L. 734.]

(*c*) 3 Ves. 739.

7. "It can make do difference that the personalty was originally sufficient to satisfy both debts and legacies, if it was afterwards lost without fault of the legatee.

or mention of realty would certainly be a new feature; though, considering the strong tendency of the recent cases in favor of such charges, it seems unlikely that any distinction of this nature will be established. So long ago as Shallcross *v.* Finden (*c*) we have a *dictum* of Sir R. P. Arden which seems to bear upon the point under consideration: "I am very clearly of opinion," said this able judge, "that whenever a testator says that his debts shall be paid, that will ride over every disposition, either against his *heir-at-law* or devisee."

The rule, however, seems to be subject to two material exceptions. First, where the testator, after generally directing his debts to be paid, has provided a specific fund for the purpose.

Exceptions to the general rule.

Thus, in Thomas *v.* Britnell, (*d*) where the testator first ordered all his debts to be honorably paid immediately after his decease; and in a subsequent part of his will devised certain hereditaments, *excepting H. and R.*, to trustees, upon trust out of the money arising by the sale to pay and discharge his *debts*, funeral expenses and all legacies given by that will or any other writing under his hand. He afterwards directed that H. and R. should be in the first place for payment of the *legacies* mentioned in his will. Sir J. Strange, M. R., held that H. and R. were not subject to the payment of debts. Though on the first part, he said, the court might take the whole real estate to be charged with debts, yet as there was no *express* lien on the real by these general words, and afterwards the testator appropriated certain part of his real for debts (*and legacies,*) and other part for legacies, it was too much to lay hold of the general words to say *that the whole should be charged with payment of debts. It could be done only by implication on the general words, which might be explained afterwards, and that implication destroyed.

Where testator has appropriated a specific fund to pay the debts, &c.

So, in Palmer *v.* Graves, (*e*) where the testator commenced his will

The doctrine must be applied to the property as it turned out to be" Rodman, J., in Little *v.* Hager, 67 N. C. 135, 139. See to same effect, Mitchener *v.* Atkinson, 63 N. C. 585; Ex parte Crocker, Id. 652.

It was held in the case of Bank, &c., *v.* Beverly, 1 How. (U. S.) 134, that a disposition of the personal property for other purpose than the payment of debts with the assent of creditors, was in itself a charge of the debts upon the real property.

(*c*) 3 Ves. 739.

(*d*) 2 Ves. 313.

(*e*) 1 Kee. 545. [See also Douce *v.* Lady Torrington, 2 My. & K. 600, *ante* p. *589; Legh *v.* Earl of Warrington, 1 B. P. C. Toml. 511, cit. 2 Ves. 272, and Belt's Suppl. 361.

with the following words: "In the first place I direct my just debts, funeral expenses and the charges of proving this my will to be duly paid;" and then proceeded to dispose specifically of certain freehold and leasehold property. The testator gave to his son A, his heirs, executors, administrators and assigns, all the residue of his real and personal estate, with the rents and profits of his freehold and leasehold hereditaments up to the quarter day next ensuing after his decease, *which rents and profits he charged with the payment of his debts, funeral expenses, and the charges of proving his will;* and the testator appointed A executor. Lord Langdale, M. R., held that the real estate was not charged by the introductory words, as the general charge by implication was controlled by the specific charge in the subsequent part of the will.

[And in Corser *v.* Cartwright, (*f*) where a testator first devised all his debts, funeral and testamentary expenses to be paid as soon as conveniently might be; then made numerous bequests and specific devises; and as to certain freehold estates therein mentioned, including the B estate, and all the residue of his real and personal estate, subject to and chargeable with his just debts, funeral and testamentary expenses and legacies, he devised the same to J., and appointed J. and S. his executors; it was held by James and Mellish, L.JJ., that the implied charge was inconsistent with and must give way to the specific charge, according to the maxim *expressum facit cessare tacitum*, and *consequently* that J., the devisee of the specifically charged estates and one of the executors was the proper person to raise money to pay the debts, and not the two executors under the implied charge.]

However, it is clear that a charge created by general introductory words is not controlled by a subsequent passage furnishing conjecture only of a contrary intention, and not actually inconsistent with such charge. As where (*g*) a testator, *after willing all his just debts, funeral expenses and the charges of proving his will to be paid, devised real estate, and gave some legacies, and then proceeded to bequeath all the residue of his personal estate, *after and subject to the payment of all his just debts, funeral and testamentary expenses and the legacies thereinbefore bequeathed.* Lord Lyndhurst, C., held that the latter words were not incon-

Not affected by express charge on residuary personal estate,

f) L. R., 8 Ch. 971. Affirmed in D. P. on independent grounds, L. R., 7 H. L. 731. Note that Lord Cairns there (740) says the estates not specifically charged were devised apparently in strict settlement.]

(*g*) Price *v.* North, 1 Phil. 85, [reversing 4 Y. & C. 509. "The direction as to

sistent with an intention to charge the real estate as an auxiliary fund; observing, that courts of equity had always been desirous of sustaining such charges for the benefit of creditors; and the presumption in favor of them was not to be repelled by anything short of a clear and manifest evidence of a contrary intention.

And Sir L. Shadwell, V. C., came to a similar conclusion on a special and very inaccurately framed will in Graves *v.* Graves. (*h*)

[Again, in Taylor *v.* Taylor, (*i*) Sir L. Shadwell decided that a direction that all the testator's just debts and funeral expenses should be fully paid and satisfied, was not cut down by a subsequent charge of specific sums on particular estates. And in Foster *v.* Thompson, (*k*) it was held that no such result followed from a subsequent charge of a specific debt on a specified estate which appeared in fact to be the testator's only real estate.

—nor by charge of specific sums either on particular lands,

—or on all the real estates.

And in Jones *v.* Williams, (*l*) where a testator began by directing his debts, funeral and testamentary expenses to be paid, and provided that in aid thereof the purchase money of an estate which he had lately sold and a debt due to him from A should be applied for that purpose; and he devised his property called T. to his wife and her heirs, in trust to sell and apply the proceeds in further aid and discharge of his debts, and then specifically devised other lands and personalty to his wife and daughter, and directed certain articles to be kept as heir-looms; Sir J. K. Bruce said that, without intimating either assent or dissent as to the cases of Douce *v.* Lady Torrington and Palmer *v.* Graves, he was of opinion upon that will that there was at the commencement of it, plainly expressed, an intention to charge all the property with all the debts, and that the following parts of the will did not contain any sufficient indication of a contrary intention; and therefore that, whatever might be the order of *precedence in which the testator considered the property chargeable, all the property was charged. The point, however, was not open to his decision.]

Whether express particular charge controls previous general charge depends on the whole tenor of will.

And here, it should be observed, that the doctrine of the preceding

the personal estate, which is by law liable to those burdens, is mere redundancy, affording no inference of any definite purpose:" Per Plumer, V. C., Noel *v.* Weston, 2 Ves. & B. 272.]

(*h*) 8 Sim. 43.

[(*i*) 6 Sim. 246. See also Clifford *v.* Lewis, 6 Mad. 33, *ante* p. *587.

(*k*) 4 D. & War. 303; see also Cross *v.* Kennington, 9 Beav. 150; Dormay *v.* Borradaile, 10 Beav. 263.

(*l*) 1 Coll. 156, 8 Jur. 373.]

First exception inapplicable to express charge.

exception extends only to charges on real estate created by general and ambiguous expressions; for, of course, a clear and explicit charge on real estate is not liable to be controlled by an express appropriation of particular lands to the purpose, (*m*) or a qualified charge of the real estate in the same will. (*n*)

Second exception, where the payment is to be made by the executors.

The second exception to the general rule under discussion occurs where the debts are directed to be paid by *executors*, in which case, unless land be devised to them, it will be presumed that payment is to be made exclusively out of funds which, by law, devolve to the executors in their representative character. [8]

Thus, in Brydges *v.* Landen, (*o*) where the testator commenced his will as follows:—"*Imprimis*, that all my debts and funeral charges and expenses be, in the first place, paid *by my executrix* hereinafter named: then as to my real and personal estate, I dispose of as follows;" and, after making such disposition, he charged and made liable all his real and personal estate with two sums of £150 to each of his daughters. All the cases were considered by Lord Thurlow, who was clearly of opinion that the real estate was not charged.

It is remarkable that this decision did not in some degree abate the confidence with which Sir R. P. Arden and Lord Loughborough, the former in Kightley *v.* Kightley (*p*) and Shallcross *v.* Finden, (*q*) and the latter in Williams *v.* Chitty, (*r*) insisted that a general direction that debts should be paid charged the real estate, inasmuch as it seems

(*m*) Ellison *v.* Airey, 2 Ves. 568; Coxe *v.* Bassett, 3 Ves. 155; [Noel *v.* Weston, 2 Ves. & B. 269; Wrigley *v.* Sykes, 21 Beav. 337.]

(*n*) Crallan *v.* Oulton, 3 Beav. 1.

8. "If the testator directs a particular person to pay, he is presumed in the absence of all other circumstances, to intend him to pay out of the funds with which he is intrusted, and not out of the funds over which he has no control. If the executor is pointed out as the person to pay, that excludes the presumption that other persons, not named, are required to pay. The distinction seems very nice; but it is intelligible in theory, however difficult it may be in its application to particular cases", 2 Story's Eq. Jur., § 1247.

Mitchener *v.* Atkinson, 63 N. C. 585. A direction that executors pay debts followed by certain legacies and then a devise of real property to A "and also all my personal estate after paying the legacies in my will mentioned" does not charge the legacies on the land devised, Gilder *v.* Gilder, 1 Del. Ch. 331.

(*o*) [3 Russ. 346, n.,] cited 3 Ves. 550, [where it is said that the circumstance that the debts were to be paid by the executrix was considered very important.]

(*p*) *Ante* p. *587.

(*q*) Ibid.

(*r*) Ibid.

to have been decided by Lord Thurlow without allusion to the circumstance that the direction to pay was *to the executors*. The case was afterwards followed, however (but with the same apparent disregard of this peculiarity), by Sir R. P. Arden himself.

Thus, in Keeling *v.* Brown, (*s*) the words were, "*Imprimis*, I will and direct that all my just debts and funeral expenses be paid and discharged as soon as conveniently may be after my *decease *by my executrix and executors hereinafter named. Item*, I give devise and bequeath unto J. all that my messuage," &c.; and, after other devises, and giving his wife an estate for life in part of the real estate, the testator appointed his wife and two other persons (who took *no* interest in the real estate) executrix and executors. Sir R. P. Arden, M. R., said he could not, with all the disposition he always felt to give such a construction to wills as should make testators honest, construe this into a charge upon the real estate; it would be a violence to all language, and making a will for the testator.

Direction to *executors* to pay debts held not to charge real estate.

Again, in Powell *v.* Robins, (*t*) where a testator first *devised* that all his just debts and funeral expenses might be satisfied and paid *by his executors therein named* as soon after his decease as might be, and then gave certain leasehold premises to his wife, and afterwards devised a freehold estate to his son D., and appointed W. and G. executors. Sir W. Grant, M. R., upon the authority of Brydges *v.* Landen, (*u*) Williams *v.* Chitty, (*x*) and Keeling *v.* Brown, (*y*) held that this estate was not charged, inasmuch as no real estate passed *to the executors who were directed to pay.*

Again, in Willan *v.* Lancaster, (*z*) where a testator directed that his debts should be paid by his executors, and "*then*" devised his lands, it was contended that the word "then" was equivalent to *after payment of the debts;* (*a*) but Sir J. S. Copley, M. R., held that it was merely

(*s*) 5 Ves. 359.

(*t*) 7 Ves. 209.

(*u*) *Ante* p. *594.

(*x*) *Ante* p. *587. But this was a determination the other way, the direction being general, and not expressly to the executors. Lord Loughborough's arguments at the hearing, indeed, pointed to the conclusion that it was not a charge; but he afterwards decided the contrary, upon the authorities.

(*y*) *Ante* p. *594.

(*z*) At the Rolls, 14th Nov., 1826, MS., 3 Russ. 108. See also Braithwaite *v.* Britain, 1 Kee. 206; (but where it is observable that the direction *to the executors* to pay the debts, on which Lord Langdale relied in his judgment, does not occur in the will, as reported:) [and Wisden *v.* Wisden, 2 Sm. & Gif. 396.]

(*a*) As to this expression, see *ante* p. *587, and vol. I., p. *820. The argument

used in the sense of *further*, and that the debts were not charges on the real estate.

Distinction where *executor is devisee of real estate.*

Where, however, the executor is devisee of real estate, a direction even *to him* to pay debts or legacies will cast them upon the realty so devised.[9] Thus, in the early case of Awbrey *v.* Middleton, (*b*) where a testator gave several legacies and annuities, to be paid *by his executor*, and then devised all the *rest and residue of his goods and chattels *and estate* (*c*) to his nephew (who was his heir-at-law,) *and appointed him executor of his will;* [the will also contained an express devise of some lands to another person;] Lord Cowper held the real estate devised to the executor was chargeable with the legacies and annuities in aid of the personal estate.

So, in Alcock *v.* Sparhawk, (*d*) the testator devised certain lands to A (his heir-at-law) and his heirs; he then gave a legacy to B to be paid *by his executor* within five years after his decease; and appointed A sole *executor* of his will, desiring him to see the will performed; it was held that the legacy was charged upon the land devised to A.

Direction to trustees for sale (also executors) to pay what testator should appoint, held to extend to debts directed to be paid *by his executors.*

So, in Barker *v.* Duke of Devonshire, (*e*) where a testator devised all his real and personal estate unto and to the use of several persons, their heirs, &c., in trust by sale or mortgage thereof to pay *whatsoever he should thereafter by will or codicil appoint.* He then appointed these persons his executors, and proceeded to direct that *his just debts, funeral expenses, &c., should be paid by his executors,* and devised the residue of his estate (after giving several

founded on the word "then," in this case, very much resembles that which lays stress on the words "*imprimis*," "in the first place," as to which see *ante* p. *588.

9. When the executor is the devisee of the real estate a charge upon it will generally be implied from a direction that the executor pay the debts, Gaw *v.* Huffman, 12 Gratt. 628, 634; but not if the real estate be specifically devised to one who happens to be the executor, Id.; Laurens *v.* Read, 14 Rich. Eq. 245, 264. But where the executors are also devisees a mere general introductory direction will not operate as a charge, Gaw *v.* Huffman, *ubi supra.*

(*b*) 2 Eq. Cas. Ab. 497, pl. 16, Vin. Ab. Charge (D), pl. 15; [see 7 H. L. Cas. 701.]

(*c*) As to the operation of this word to carry the real estate [and as to the controlling effect on words *prima facie* including realty of appointing the devisee executor, see *ante* ch. XXII.]

(*d*) 2 Vern. 228, 1 Eq. Cas. Ab. 198, pl. 4. See also Goodright d. Phipps *v.* Allen, 2 W. Bl. 1041; Doe d. Pratt *v.* Pratt, 6 Ad. & Ell. 180; [Elliott *v.* Hancock, 2 Vern. 143; and of course the construction is not varied by renunciation of probate by the person named executor, Lypet *v.* Carter, 1 Ves. 499; and per Lord Thurlow, 1 Ves., Jr., 446.]

(*e*) 3 Mer. 310.

specific legacies) to his son. Sir W. Grant held that this authorized a sale for the payment of debts, though it was contended that the direction being *to the executors* showed the intention of the testator to confine it to personal estate.

Again, in Henvell *v.* Whitaker, (*f*) where a testator directed that all his just debts and funeral expenses should be paid by his executor thereinafter named, and then gave all his real and personal estate to his nephew A, his heirs, executors, administrators and assigns, and appointed him executor: Sir J. Leach, M. R., decided that the direction to the nephew to pay the debts operated to charge all the property, both real and personal, which he derived under the will.

Same rule where executor is devisee in trust.

[And even where the land is devised to the executors upon trust for other persons, it seems the effect is the same. Having the estate, and being charged with the payment of the debts, *they are to consider the creditors as having the first claim upon the trust. Thus, in Dormay *v.* Borradaile, (*g*) where a testator commenced by giving all his property to his wife: he next appointed her and two others executors, and "to them, his executors" gave certain real estates in trust for his wife and children, and concluded thus, "my executors are charged with the payment of my just debts," Lord Langdale, M. R., held that the real estates were charged with the debts.]

It is difficult to reconcile with this line of authorities the case of Parker *v.* Fearnley, (*h*) where, a testatrix having directed legacies to be paid by her executor, to whom she devised all her real estates in fee, and also the residue of her personalty, after payment of her debts and funeral expenses, Sir J. Leach, V. C., held that the pecuniary legacies were not charged on the real estate devised to the executor.

Remark on Parker *v.* Fearnley.

As this case was prior to, it must be considered as overruled by Henvell *v.* Whitaker [and the subsequent cases cited above], with which it is clearly inconsistent. Neither Awbrey *v.* Middleton nor Alcock *v.* Sparhawk was cited to, or noticed by, the V. C.

And the circumstances that the estate given to the devisee is an

(*f*) 3 Russ. 343. See also Dover *v.* Gregory, 10 Sim. 393; [Harris *v.* Watkins, Kay 438; Cross *v.* Kennington, 9 Beav. 150 (aided probably by gift of "residue," see *post* p. *603.)

(*g*) 10 Beav. 263. See also Hartland *v.* Murrell, 27 Beav. 204.]

(*h*) 2 S. & St. 592.

Effect where debts are to be paid by tenant in tail, &c.

estate tail, and the direction to pay the debts is connected by juxtaposition with the bequest of the personalty and the appointment of executor, and separated by several intervening sentences from the devise of the lands, are, it seems, immaterial.

Thus, in Clowdsley *v.* Pelham, (*i*) where a testator devised land to *A and the heirs of his body,* remainder over; and in another part of his will gave to A all the personal estate, and appointed him executor, *willing him to pay the testator's debts;* it was held that the real estate was charged.

Where by tenant for life.

It is not equally clear, however, that a direction to an executor to pay debts, would have the effect of charging lands devised to him *for life* only. Undoubtedly in Finch *v.* Hattersley (*k*) the real estate was held to be charged under circumstances of this nature; but it does not appear that the fact of the executrix being a devisee for life of the real estate had any influence upon the court; and as the case was decided when a general direction to an executor to pay debts might possibly have been considered sufficient to charge them upon real estate *not devised to the *executor* (the doctrine upon the subject being more lax and the distinctions less defined than at present,) the case cannot be relied on as an authority on the point above suggested. [Doe d. Ashby *v.* Baines, (*l*) in which it was decided upon a similar will that the real estate was *not* charged with debts, is not more satisfactory as an authority on the point; the Court of Exchequer appearing to deny the efficacy in any case of a direction to the executor to pay debts for the purpose of charging the real estate devised to him. None of the cases in chancery noticed above were cited. However, in Harris *v.* Watkins, (*m*) Sir W. P. Wood, V. C., though he said it might be argued that it was not a probable intention of the testator to effect a charge on a life estate by such a direction; yet as the executor had an absolute interest in the residuary real estate, as well as a life interest in a specific portion, decided that both were charged with debts, the residuary estate being first liable. And in Cook *v.* Dawson, (*n*) under a direction to the executrix to pay the debts, followed by a devise to her for life, with remainder over, Sir

(*i*) 1 Vern. 411, 1 Eq. Cas. Ab. 198, pl. 2.

(*k*) 3 Russ. 345, n.

[(*l*) 2 C., M. & R. 23.

(*m*) Kay 438, 447.

(*n*) 7 Jur. (N. S.) 130: since reported 29 Beav. 123, where the opinion above referred to does not appear. Affirmed as to the fee, 3 D., F. & J. 127.]

J. Romilly, M. R., while holding that the fee was not charged, expressed a clear opinion that the life estate was.]

It is quite clear, however, that a limited estate devised to *one* of several executors in the testator's lands will not be charged with debts, under a direction to the executors to pay them. (*o*) Indeed, such is clearly the rule even where an estate *in fee* is devised to *one* of several executors.

Effect where devise is to *one* of several executors.

Thus, in Warren *v.* Davies, (*p*) where a testator directed that his debts and legacies, funeral expenses and testamentary charges should be paid by his executors thereinafter named; and, after directing certain real estates to be sold by his executors on the decease of his wife, he devised certain messuages and lands to his son Thomas Davies in fee, and gave him the residue of his real and personal estate. The testator appointed Thomas Davies *and another* executors. Sir J. Leach, M. R., held that the estate devised to Thomas Davies was not to be considered as charged with the debts and legacies directed to be paid by the executors, merely because the devisee happened to be one of the executors. And the same rule seems to have been again acted upon by the same judge, though without any dis*tinct recognition of this ground of decision, in Wasse *v.* Heslington. (*q*)

[In the case last named some real estate was given to each of the executors, but more to one than to the other. This inequality has been thought to afford an argument against their being intended to bear the debts in equal proportions, (*r*) as they would do under a charge. Indeed, the rule has never been applied to separate gifts to several executors. And though the gift to the executors is one and undivided, the implied charge may be rebutted by the context; as, if part only of the real estate is given to them, and other parts to other persons; in such a case the distribution of the estate may be such as to make it very improbable that the testator intended that the former part should be charged, and the latter not; (*s*) especially if the part given to the executors is not for them beneficially, but in trust for other persons. Thus, in In re Bailey, (*t*) where a testator directed his debts, funeral and testamentary expenses to be paid

Effect where distinct devises to several executors;

—where part only of the realty is given to the executors.

(*o*) See Keeling *v.* Brown, 5 Ves. 359.

(*p*) 2 My. & K. 49.

(*q*) 3 My. & K. 495.

[(*r*) Per Wood, V. C., Kay 448, misquoted as "*unequal* proportions," 12 Ch. D. 273.

(*s*) Symons *v.* James, 2 Y. & C. C. C. 301. See the case.

(*t*) 12 Ch. D. 268.

by his executors thereinafter named, and appointed A and B trustees and executors of his will: he then gave a specific part of his real and leasehold property for the benefit of each of his six children, the sons' portions being devised to them directly, and the portion of each daughter being devised to the trustees upon trusts for the daughter and her children. (The portion of one daughter consisted of leaseholds only, but this attracted no attention.) And the residue of his estate real and personal he gave to the trustees, in trust to sell and hold the proceeds for his widow during her life, and afterwards for his said six children in equal shares. Fry, J., said, "The conclusion that the real estate settled upon the daughters and their children is charged with the payment of the testator's debts, while that which is devised to the testator's sons beneficially is not so charged, would not be in accordance with the equality which one would expect to find when a man is making a provision for all the members of his family. Looking at the residuary clause, it appears to have been the intention of this testator to divide his property equally among his children." He added, that in all the cases where the real property given to the executors was held to be charged, they were devisees of the whole real estate, so that the entirety of the liability was thrown on the entirety of the *estate. He therefore held that neither the estates specifically devised to the sons, nor those which were specifically devised on trust for the daughters, were charged with the debts; but that the residuary real estate was charged by force of the word "residue," (u) coupled with the direction to pay the debts.

Where direction to executors to pay debts is followed by a devise to one of them "subject as aforesaid."

But if a testator begins with a direction that his debts and legacies shall be paid by his executors and then, without any intermediate gift, says, "*and subject as aforesaid* I give all the residue of my real estate to A (who is a stranger or one of several executors), the real estate will be charged with debts and legacies; since there is no other way of giving a sense to the words "subject as aforesaid."] (w)

Where a testator gives his real and also his personal estate, after payment of debts, &c., it is sometimes a question whether these words extend to charge both the preceding subjects of gift, or apply only to the immediate antecedent, namely, the personal estate.

Thus, in Withers v. Kennedy, (x) where a testator, after bequeath-

(u) *Post* p. *603.
(w) Dowling v. Hudson, 17 Beav. 248.]
(x) 2 My. & K. 607.

ing to his wife certain effects, gave, devised and bequeathed all his freehold, copyhold and leasehold estates whatsoever and wheresoever and all the residue of his personal estate and effects, *after payment of his just debts and funeral expenses and the charges of proving his will and of carrying the trusts thereof into execution*, to trustees their heirs, executors and administrators, upon trust for his wife for life, with other limitations over; it was contended that the personal estate being the natural fund for the payment of debts, it was a more obvious and natural construction to refer these words to the immediate rather than the more remote antecedent; that more remote antecedent being a species of property not legally liable to debts; but Sir J. Leach, M. R., though he admitted that the expression in the will afforded some color to this argument, considered that, in plain construction, the words in question were to be referred to the freehold, copyhold and leasehold property, as well as to the personal estate. He considered it to be an objection to the opposite construction, that it imputed to the testator the intention of exempting his leaseholds from the payment of his debts, &c., which species of property was by law subject to them.

Whether charge extends to several preceding subjects of disposition.

[So, in Moores *v.* Whittle, (*y*) which perhaps admitted of less *doubt, in which a testator gave to his daughter C. as long as she continued unmarried all his copyhold estates at P. and also all his live and dead stock, household furniture, moneys and securities for money and farming gear of every description *after payment of his just debts, funeral expenses and the costs of proving his will;* and if C. should marry, then the whole of the estates above described, together with the live and dead stock, household furniture, farming implements and goods to be sold, and the proceeds divided as therein mentioned; Sir J. Parker, V. C., considering that the rule of the court was to enlarge rather than to narrow a charge of debts, and that the testator had in the subsequent parts of his will dealt with the whole property as one mass, held the copyholds to be charged with the debts.]

In Kidney *v.* Coussmaker, (*z*) the question was much contested, whether, where a testator devises lands in trust to be sold, declaring

[(*y*) 22 L. J., Ch. 207. How much of what precedes shall be held affected by referential expressions is a frequently recurring question. See *e. g.*, Baker *v.* Baker, 6 Hare 269; Fisher *v.* Brierley, 30 Beav. 265; Makings *v.* Makings, 1 D., F. & J. 355 (question whether charge affected life estate as well as remainder.)]

(*z*) 1 Ves., Jr., 436, 7 B. P. C. Toml. 573. See also 2 Ves., Jr., 267.

that the produce shall go in the same manner as the personal estate, and then bequeaths the personalty "after payment of his debts," the produce of the real estate was by these words (which were clearly inoperative in regard to the *personalty*) charged with the debts. It was not necessary to decide the point; [which, however, has since been decided in the affirmative.] (*a*)

Charge of debts "I *have* contracted."

Here it may be observed, that, in construing provisions for payment of debts, the courts are averse to an interpretation which would restrict the provision to debts subsisting at a given period during the life of the testator; and therefore, although words in the present tense generally refer to the time of making the will, (*b*) yet it has been held that a charge of all the debts "I *have* contracted since 1735" extended to future debts. (*c*) [On the same principle where a testator charged his real estate with his debts "of which he should leave an account," and left an account omitting some, all were held to be charged.] (*d*)

Whether same words will charge legacies as debts.

It has sometimes been made a question, whether the same *words which will charge real estate with *debts* will suffice to onerate it with legacies; or whether, in order to throw legacies upon the land, a clearer manifestation of intention is not requisite.[10] Sir R. P. Arden and Lord Loughborough were

[(*a*) Soames *v.* Robinson, 1 My. & K. 500; Shakels *v.* Richardson, 2 Coll. 31; In re Woollard's Trust, 18 Jur. 1012; Bright *v.* Larcher, 3 De G. & J. 148; Field *v.* Peckett, 29 Beav. 568.]

(*b*) *Ante* vol. I., p. *319.

(*c*) Bridgman *v.* Dove, 2 Atk. 201. [*A fortiori* future debts are included where the charge is simply of "all my debts," Maxwell *v.* Maxwell, L. R., 4 H. L. 506.

(*d*) Dormay *v.* Borradaile, 10. Beav. 263.]

10. A charge upon real estate may be implied, and requires no particular form of words, Ripple *v.* Ripple, 1 Rawle 386; English *v.* Harvey, 2 Id. 305; Wright's Appeal, 12 Penna. St. 258; Davis' Appeal, 83 Id. 348; Gilbert's Appeal, 85 Id. 347; Budd *v.* Williams, 26 Md. 265; Quinby *v.* Frost, 61 Me. 77; Heslop *v.* Gatton, 71 Ill. 528; Stevens *v.* Gregg, 10 Gill & J. 143; Reynolds *v.* Reynolds, 16 N. Y. 257; Harris *v.* Fly, 7 Paige 421; Laurens *v.* Read, 14 Rich. Eq. 245, 261.

A devise to A at an appraisal value is not a devise subject to testator's debts, Spalding *v.* Spalding, 2 Root 271. Such devise, however, constitutes a charge of the amount appraised, Hart *v.* Homiller, 23 Penna. St. 39; Baker's Appeal, 59 Id. 313; Gilbert's Appeal, 85 Id. 347. But it has been held to be otherwise with a devise that "the plantation be offered to A, B and C or whichever one of them will take it and pay my executors $4500 and in default of any of them being willing to pay this sum," executors to sell, and this was held to be merely a provision for sale, Browder *v.* Jackson, 3 Lea (Tenn.) 151.

A power of sale, with direction that the purchaser hold the amount of A's and

long at issue upon the point; the former maintaining and the latter denying the distinction, (*e*) which, however, did not originate with Sir R. P. Arden; for it is to be traced in the early case of Davis *v.* Gardiner, (*f*) where the testator commenced his will thus: "As to my worldly estate, I dispose of the same as follows *after my debts and legacies paid;*" and then gave several legacies, adding, "After all my legacies paid I give the residue of my *personal* estate to my son," and then devised his lands: and Lord Macclesfield held that the legacies were not a charge upon the realty; observing that "as plain words are necessary to disinherit an heir, so words equally plain are requisite to charge the estate of an heir, which is a disinherison *pro tanto.*" In a note to this case, the reporter adds, that, if there had been a want of assets for the payment of debts, it seems that the land would have been charged therewith.[11]

"As to my worldly estate, *after my debts and legacies paid.*"

The distinction in question appears to have been a natural consequence of the extreme length which the courts had gone in holding *debts* to be charged by loose and equivocal expressions, the unfairness of which, when applied to legacies, became apparent, "there being no reason (as Sir R. P. Arden has observed), why a specific devise should not take effect as much as a pecuniary one." (*g*)

As to distinction between debts and legacies.

In Trott *v.* Vernon, (*h*) however, and several of the other cases before stated, in which debts and legacies were coupled in one clause, there is no mention of any such distinction; and instances may certainly be adduced from the later cases in which legacies have been held to be charged upon land by expressions of a character scarcely more decisive than those which have this operation in regard to debts.[12]

B's shares till they come of age, "by giving them a good and sufficient security and paying the interest," was held to raise a charge on the land in the hands of the first purchaser, Neal *v.* Torny, 4 Clark (Pa.) 421. But a devise for the use of testator's widow after his debts should be paid, with power to sell if the rents should not suffice for her maintenance, constitutes no charge of debts, being only for the widow's support, Miller's Appeal, 60 Penna. St. 404. In this case the English cases were not followed, being deprived of their applicability by the Pennsylvania statutes making lands liable to sale for payment of debts by order of the court.

(*e*) Kightley *v.* Kightley, 2 Ves., Jr., 328; Williams *v.* Chitty, 3 Ves. 551; Keeling *v.* Brown, 5 Ves. 361.

(*f*) 2 P. W. 187.

11. See as to want of assets for payment of debts, Little *v.* Hager, 67 N. C. 135, 139.

(*g*) 3 Ves. 739.

(*h*) *Ante* p. *585. [See also Tompkins *v.* Tompkins, Pr. Ch. 397; Alcock *v.* Sparhawk, 2 Vern. 228.]

12. Legacies do not stand upon as high ground as debts. But if the personalty

[Thus in Preston *v.* Preston, (*i*) where a testator devised real estate in fee to his son, who, it is stated, was his executor. Also he gave him his stock of cows, rest, residue and remainder of his effects; and that he should pay to the testator's

Words sufficient to charge legacies.

be inadequate, and there be such expressions in the will as would indicate that the testator had the land in mind, the court will make the legacies a charge rather than that they should go unpaid, Downman *v.* Rust, 6 Rand. (Va.) 587. In this case the testatrix, having but little personal property, and real estate of considerable value, gave two pecuniary legacies to friends as tokens of affection, and made her brother executor and residuary legatee, and it was considered that she intended the legacies to be paid out of the real estate, and they were accordingly charged upon it.

Land devised is not liable for the payment of legacies unless so charged, either expressly or by necessary implication, Case *v.* Case, Kirby (Conn.) 284; Logan *v.* Deshay, 1 Clarke (N. Y.) 209; Bevan *v.* Cooper, 7 Hun 117; Lupton *v.* Lupton, 2 Johns. Ch. 623; Gerken's Estate, 1 Tuck. 49; Mellon's Appeal, 46 Penna. St. 165; Montgomery *v.* McElroy, 3 Watts & S. 370. And this rule applies to a legacy in lieu of dower, Sanford *v.* Sanford, 4 Hun 753. But in Connecticut pecuniary legacies are by statute made a charge upon lands not specifically devised when the personalty proves insufficient, Gen. Stats. 1875, p. 370.

The more recent decisions tend to hold that words which will charge debts will also charge legacies, Ogle *v.* Tayloe, 49 Md. 158.

To charge the payment of a legacy upon testator's real property the intention must clearly appear, Gridley *v.* Andrews, 8 Conn. 5; Matthewson *v.* Saunders, 11 Conn. 148; Leavenworth *v.* Marshall, 19 Id. 419; Van Winkle *v.* Van Houten, 2 Gr. Ch. (N. J.) 186; Paxson *v.* Potts, Id. 313; Myers *v.* Eddy, 47 Barb. 263; Lupton *v.* Lupton, 2 Johns. Ch. 623; Clyde *v.* Simpson, 4 Ohio St. 445; Geiger *v.* Worth, 17 Id. 564; Wright's Appeal, 12 Penna. St. 256; Kirkpatrick *v.* Chesnut, 5 S. C. (N. S.) 216; Budd *v.* Williams, 26 Md. 265; Stevens *v.* Gregg, 10 Gill & J. 143; Scott *v.* Morrison, 5 Ind. 551; Dugan *v.* Hollins, 4 Md. Ch. Dec. 139; Ogle *v.* Tayloe, 49 Md. 158. And a bequest to A "to make her equal to the rest" without other words, shows no such intention, Okeson's Appeal, 59 Penna. St. 99. But if legacies are placed upon the same footing with one that is a charge, this will be taken to show an intention, Devereux *v.* Devereux, 78 N. C. 386.

For further instance of a charge implied from the context of the will, see McLoughlin *v.* McLoughlin, 30 Barb. 458; Loback's Case, 6 Watts 167. So a charge of legacies upon land was implied where all the land was given to testator's widow for her life, and all the personalty absolutely and the legacies were to be paid after her death, only part of the real estate being given over in remainder, Clery's Appeal, 35 Penna. St. 54.

But a gift of all property to the wife for her life, "she to pay A the interest on $4000 during her natural life," constitutes a charge only on the income of the property, Jackson *v.* Atwater, 26 N. Y. S. C. (19 Hun) 627. To similar effect seems to be Wallington *v.* Taylor, Saxt. 314, where an estate less than a fee was given to A, with a legacy to B, to be paid by A "out of the estate given to him"; the charge was held to be on A's estate in the land, but not on the land. But both of these cases depart from the rule laid down in Sadd *v.* Carter, Pre. Ch. 27, 2 Eq. Cas. Abr. 370, where the devise was to A for life, remainder to

[(*i*) 2 Jur. (N. S.) 1040.]

grandson £300; it was held by Sir J. Stuart, V. C., (*k*) that the real estate was *charged with the grandson's legacy. Parker *v.* Fearnley (*k*) he said was overruled by Henvell *v.* Whitaker. (*l*)

So in Gallemore *v.* Gill (*m*) where a testatrix bequeathed her wearing apparel and furniture to her niece, and gave all her real and the residue of her personal estate to trustees, in trust to pay her debts and funeral expenses *and a legacy* of £10 to her servant *out of her personal estate,* and to pay out of her real estate so much of her *debts and funeral expenses* as her personal estate should be insufficient to satisfy, and subject thereto as to the entire residue of her estate and effects in trust for her three grandchildren. By codicil the testatrix directed the trustees acting under her will (who it appears were also her executors) to pay to her servant £40 in addition to the £10, and in addition to the bequest above mentioned to pay a life annuity to her niece; it was held by Sir J. Stuart, V. C., and on appeal by K. Bruce and Turner, L. JJ., that the legacies given by the codicil were charged on the real estate. Turner, L. J., said "The will vested in the trustees the residue of the personal estate and the whole of the real estate, and the presumption is that it was out of the funds thus vested in the trustees that the payments directed by the codicil were to be made." No doubt "additional" legacies were generally payable out of the same funds as original legacies: "but the codicil may not only add to the legacy but extend the fund out of which it is to be paid; and in this will and codicil I think there is no doubt that this is the case. The codicil contains a direction that the trustees shall pay the legacy, and the testatrix by her will has blended real and personal funds in the hands of the trustees for the payment."

It is clear that the rule in Kidney *v.* Coussmaker (*n*) applies to leg-

the children in fee, A paying £40, and it was expressly held to be a charge on the land, and not on A's estate in the land. The case of Quick *v.* Quick, Saxt. 4, follows the rule in Sadd *v.* Carter, and holds the charge to be upon the *whole estate.* While in Pawlett *v.* Perry, 4 Vin. Abr. 461, 2 Eq. Cas. Abr. 497, the court was in doubt as to the charge, and no decision was given as to that point.

A legacy to minors, when they arrive at the age of twenty-one, charged on land, is not discharged by payment before that time to their guardian, Cato *v.* Gentry, 28 Ga. 327; nor, when land is charged with payment of a legacy to B and then devised to A, is it discharged by A's bequeathing to B a larger amount than the legacy, Caldwell *v.* Kinkead, 1 B. Mon. 229.

[(*k*) Citing Alcock *v.* Sparhawk, 2 Vern. 228, 1 Eq. Cas. Ab. 198, pl. 4, *ante* p. *596.

(*k*) *Ante* p. *597.

(*l*) *Ante* p. *596.

(*m*) 2 Sm. & G. 158, 8 D., M. & G. 567. See also Peacock *v.* Peacock, 34 L. J., Ch. 315.

(*n*) *Ante* p. *601.

acies as well as to debts; (o) although the personalty is not in terms charged with the payment of them. (p)

Giving legacies, and then *the rest* of the real and personal estate, charges the legacies.

It is also clear that where legacies are given and then "all the residue of the real and personal estate," the legacies are charged on the realty. [Thus, in Hassel *v.* Hassel, (q) where the testator devised and bequeathed certain legacies, and then gave, devised and bequeathed all his real and personal estate *not there*inbefore disposed of;* Lord Bathurst held that the legacies were charged upon the real estate. [13]

And Lord Hardwicke in Brudenell *v.* Boughton (r) seems to have thought that where a testator gave certain legacies, and then the *rest* of his estate, *real* and personal to A, whom he appointed executor, the legacies were charged upon the land; but the case was not decided on this point.

(o) Bright *v.* Larcher, 3 D., F. & J. 148.

(p) Field *v.* Peckett, 29 Beav. 568; see also In re Woollard's Trust, 18 Jur. 1012.]

(q) 2 Dick. 527. [See also Smith *v.* Butler, 1 Jo. & Lat. 692.]

13. Land is charged where it is devised subject to a legacy to be paid by the devisee, Newman's Appeal, 35 Penna. St. 339; Wertz's Appeal, 69 Id. 173; Bugbee *v.* Sargent, 23 Me. 269; or "subject to the devises and bequests herein otherwise made," Devereux *v.* Devereux, 78 N. C. 386; or "after the payment of my debts and the payment of the legacies hereinafter named," Funk *v.* Eggleston, 92 Ill. 515; or "subject to legacies," Ibid. So where devisees are "to make up the deficiency," if the personal property is insufficient to pay off the legacies, Field's Appeal, 36 Penna. St. 11. So where there is a residuary gift "after securing" a certain legacy, although the legacy had been expressly charged on other devised land, McCredy's Appeal, 47 Penna. St. 442. So where there was a legacy of one-third the valuation of lands devised to H., and a devise of the lands to H., "subject to the encumbrance that he shall pay one-third of the valuation of said lands to said" legatee, Brown *v.* Grimes, 60 Ala. 647. See also Mitchener *v.* Atkinson, 63 N. C. 585. But in a devise subject to a bequest of a certain sum to A to be paid at the age of eighteen, in land, there is no charge in favor of A, the devisee's power to sell the land and re-invest the proceeds being a discretionary one, Coonrod *v.* Coonrod, 6 Ohio 114. Where the testator devised certain lands to W., and "in case the title to the land willed to W. should prove a valid one," he gave unto B., J. and S. the sum of $3000; but in case the said title should prove not valid, the $3000 legacy was not left, it was held that this legacy was a charge upon the lands devised to W., Budd *v.* Williams, 26 Md. 265. In this case, at page 273, it is said by Goldsborough, J.: "It is, however, conceded by the appellees, that a charge upon real estate may be by necessary implication, especially where the testator clearly indicates his intention that his personal estate should not be so applied. We think the intention of the testator in this case is so obvious to charge the legacy upon the real estate and to regard that as the primary fund, that in conscience the personal estate ought to be exonerated, because only auxiliary."

(r) 2 Atk. 268, referred to *ante* vol. I., p. *94.

(s) 4 Mad. 187.

So, in Bench *v.* Biles, (*s*) where the testator gave all his real and personal estate to his wife for life, and after her decease gave various legacies, and all the *rest, residue and remainder* of his *real and personal* estate he gave, devised and bequeathed to his nephews P. and W., share and share alike, their heirs, executors, administrators or assigns forever. Awbrey *v.* Middleton (*t*) was cited as an authority that the legacies were charged: and Sir J. Leach, V. C., decided accordingly, considering the intention in favor of the legatees to be clearer than in the cited case.[14] "The testator," he said, "here gives all his real and personal estate to his wife for life,

Blending real and personal estate together.

(*t*) *Ante* p. *595.

14. Where the testator gave certain legacies without any express provision for their payment, and directed his executors to pay his debts, and devised to them by name "all and singular my real and personal estate," it was held that there was no blending of the real and personal property and no charge of the legacies upon the land so devised, Reynolds *v.* Reynolds, 16 N. Y. 257. This case was subsequently questioned in Shulters *v.* Johnson, 38 Barb. 85. See also Stoddard *v.* Johnson, 13 Hun 606. And it has been held that a direction that devisees pay legacies in proportion to the appraised value of their devised lands constitutes no charge of the legacies upon the lands, Hackadorn's Appeal, 11 Penna. St. 89. A devise of real and personal property "except so much thereof as will pay my just debts, which I think may be done from the growing crops," creates no charge in favor of creditors upon the personal property devised, Hines *v.* Spruil, 2 Dev. & Bat. Eq. 101. But otherwise, where a devise of real property is made to testator's son "except that there remain in the hands of my executor to be paid by my son" a certain sum for his wife and children, Pierce *v.* Livingston, 80 Penna. St. 99.

After certain legacies without any express provision of means of payment, a *residuary gift blending the real and personal property* of the testator creates a charge of the legacies, the word "residue" implying that such payments be first made, Lewis *v.* Darling, 16 How. (U. S.) 1; Wilcox *v.* Wilcox, 13 Allen 252; Matthewson & Arnold, Petitioners, 12 R. I. 145; Adams *v.* Bracket, 5 Metc. 280; Taylor *v.* Dodd, 58 N. Y. 335; Regan *v.* Allen, 7 Hun (14 N. Y. S. C.) 537; Forster *v.* Civill, 20 Hun 282; Tracy *v.* Tracy, 15 Barb. 504; Moore *v.* Beckwith, 14 Ohio St. 129; McLanahan *v.* Wyant, 1 Penr. & W. (Pa.) 96; English *v.* Harvey, 2 Rawle 305; Corwine *v.* Corwine, 9 C. E. Gr. (N. J.) 579; Miller *v.* Sanford, 4 Stew. (N. J.) 427; Hackadorn's Appeal, 11 Penna. St. 89; Swoope's Appeal, 27 Id. 58; Gallagher's Appeal, 48 Id. 121; Becker *v.* Kehr, 49 Id. 223; Wertz's Appeal, 69 Id. 173; Brisben's Appeal, 70 Id. 405; Hassanclever *v.* Tucker, 2 Binn. 525, affirming 3 Yea. 294; Witman *v.* Norton, 6 Binn. 395; Nichols *v.* Postlethwaite, 2 Dall. 131; especially if the personalty be insufficient, Shulters *v.* Johnson, 38 Barb. 80; Rafferty *v.* Clark, 1 Bradf. 473; Commonwealth *v.* Shelby, 13 Serg. & R. 348; Tower's Appropriation, 9 Watts & S. 103; so in like case a gift of the "balance of my estate," Rom. Cath. Ch. *v.* Wachter, 42 Barb. 43; Hart *v.* Williams, 77 N. C. 426. But this rule does not extend to a bequest of specific funds, "money due," Mellon's Appeal, 46 Penna. St. 165. As to the effect of a residuary gift combined with other circumstances, see Van Winkle *v.* Van Houten, 2 Gr. Ch. (N. J.) 172. See also Harris *v.* Fly, 7 Paige 421; Moore *v.* Beckwith, *ubi supra;* English *v.* Harvey, 2 Rawle 305; Dey *v.* Dey's Adm'r, 4 C. E. Gr. (N. J.) 137; Matthew-

blending them together as one fund for her use, and, after her death, he gives several pecuniary legacies, and then the rest, residue and remainder of his real and personal estate to his nephews. He plainly continues after his death to treat them as one fund, 'the rest, residue and remainder' of which, after payment of his legacies, is to go to his nephews."

Remarks upon Bench v. Biles.

It should be remarked, however, that in Awbrey v. Middleton, the executor, *being the devisee of the real estate*, was expressly directed to pay the legacies and annuities, which has always been held sufficient to charge the real estate.

Hassel v. Hassel.

The case of Hassel v. Hassel, (u) though not cited, more closely resembles Bench v. Biles; but even that was rather stronger in favor of the charge, from the circumstance of

son & Arnold, Petitioners, 12 R. I. 145. An annuity in lieu of dower after other devises and bequests, followed by a devise of residue, real and personal, charges the annuity on the land if the personalty is insufficient, Conard's Appeal, 33 Penna. St. 47. And in Marcy's Estate, 22 Penna. St. 140, a gift of the sole use of the residue, real and personal, for the devisee's support for her natural life, was held to constitute a charge for which the land might be sold, if the rents proved insufficient; and so, in general, a gift of residue after a legacy; see, too, McGlaughlin's Ex'r v. Adm'r, 24 Id. 20.

Where the residue, real and personal, was devised, with a direction to executors to receive the income, and "out of the same pay" certain annuities, they were held to be a charge, in equal moieties, upon the real and the personal property, and the executors were required to hold the property for that purpose, Nash v. Cutler, 19 Pick. 67. But a charge was held not to be implied from a gift of the residue, both real and personal, after a pecuniary legacy "to be paid by my executor out of my estate," the estate in the executor's hands being held to be intended, Swift v. Edson, 5 Conn. 531; Riley's Appeal, 34 Penna. St. 291; and see Gridley v. Andrews, 8 Conn. 5; Leavenworth v. Marshall, 19 Id. 419. Nor is such implication always made from a mere residuary gift after legacies, Lupton v. Lupton, 2 Johns. Ch. 614; Laurens v. Read, 14 Rich. Eq. 245. In such case "residue" has been construed to mean residue after debts and funeral expenses are paid, Clery's Appeal, 35 Penna. St. 54; and also after legacies are paid, Matthewson & Arnold, Petitioners, 12 R. I. 145. After a devise of land a gift of *residue*, real and personal, does not necessarily imply a charge of legacies upon the residuary land devised, Paxson v. Potts, 2 Gr. Ch. (N. J.) 313; and see Van Winkle v. Van Houten, Id. 172; Bevan v. Cooper, 7 Hun 117.

But in such case where the devise is preceded by a direction to pay debts, and the rest and residue of the real and personal property are to be sold and legacies paid out of the proceeds, they are a charge upon the land, Marsh v. Wheeler, 2 Edw. 156. See also Conard's Appeal, 33 Penna. St. 47, where an annuity in lieu of dower after a specific devise was held to be a charge upon the succeeding residuary gift. So, too, where an annuity was given to A, after an express direction by the testator that his debts and expenses be paid, followed by a devise of the residue after A's death, the personalty proving insufficient, and the real property having been sold for debts and a balance remaining, Lapham v. Clapp, 10 R. I. 543.

Where the personal property greatly

(u) *Ante* p. *603.

there being no precedent gift affecting the real estate (unless the legacies were so considered,) to which the words "not hereinbefore disposed of" could be referred, though this expression might have been taken to apply exclusively to the personalty, *referendo singula singulis*. In Bench *v.* Biles, on the other hand, the words "rest and residue" might have had reference to the precedent devise of the real estate to the wife for life. (*x*)

Gift of "residue" after bequeathing legacies charges lands;

That a bequest of legacies, followed by a gift of all the *residue* *of the testator's real and personal estates, operates to charge the entire property with the legacies, was again decided by Sir J. Leach in Cole *v.* Turner; (*y*) to which may be added Mirehouse *v.* Scaife, (*z*) where a testator, after bequeathing certain pecuniary legacies, declared his will to be, that all his debts and all the above legacies should be paid within six months after his decease; and all the *residue* of his estate, both real and personal, lands, messuages and tenements, the testator gave to A, by her to be freely possessed at his decease. It was held by Lord Cottenham that by these words the real estate was charged as well with the legacies as the debts. [He observed that the blending of the real and personal estate, and the gift of the residue of both following a direction to pay debts and legacies, relieved the case from the question discussed by Lord Rosslyn and Lord Alvanley in Williams *v.* Chitty and Keeling *v.* Brown, as to whether words admitted to be sufficient to charge lands with debts, ought to be held sufficient to charge them with legacies.]

—notwithstanding prior specific devise.

It is worthy of remark, that neither in this case, nor in Cole *v.* Turner, was there any specific devise of real estate to which the term "residue" might be referred: (*a*) [but in Francis *v.* Clemow, (*b*) where a testator, after directing payment of his debts, bequeathed certain legacies, and then gave certain interests in part of his real estate, and gave "all the rest, residue and remainder of his estate and effects both real and personal" to A, whom he appointed executor. Sir W. P. Wood, V. C., on the authority of Bench *v.* Biles, held that, notwithstanding the previous devises, the

exceeds the real and is more than sufficient for the payment of all debts and legacies, a charge will not be implied from the mere fact of a residuary devise blending the real and personal property, Myers *v.* Eddy, 47 Barb. 263; Laurens *v.* Read, 14 Rich. Eq. 245.

[(*x*) See also Francis *v.* Clemow, Kay 435, *post* p. *605.

(*y*) 4 Russ. 376.

(*z*) 2 My. & Cr. 695.

(*a*) In Mirehouse *v.* Scaife there was a devise of a field called Gillfoot; but it did not appear whether it was freehold or leasehold.

(*b*) Kay 435. See also Wheeler *v.* Howell, 3 K. & J. 198 (where the V. C. appears to treat the fact of the devisee being executor as material: *sed qu.*)

legacies were charged on the real estate by force of the residuary gift.

Greville v. Browne.

Finally, in Greville *v.* Browne, (*c*) where a testator after bequeathing an annuity and some pecuniary legacies, gave "all the rest, residue and remainder of any property he might die possessed of or entitled to of what nature soever" to his son, it was held in D. P. that the legacies were charged on the real estate. There was no previous devise of real estate; but it was *laid down in the most general terms, that where there is a bequest of legacies followed by a gift of the residue of the testator's property real and personal, the legacies are charged on the realty; and, as had previously been held by Sir W. P. Wood, (*d*) that the principle of these decisions was the same in the case of legacies as in that of debts. "It is considered," said Lord Campbell, "that the whole is one mass; that part of that mass is represented by legacies; and that what is afterwards given is given minus what has been before given, and therefore given subject to the prior gift." And Lord Cranworth, treating the distinction between real and personal property as purely artificial, said, "In reading *a devise of real estate* to one person, and of personal legacies to another, and of the residue of the real and personal property to a third person, we may see that there *might* be a mode of interpreting it *reddendo singula singulis*, as meaning to give the rest of the personal property to one person, and the rest of the realty to another. *But that is not the natural meaning of the words.*"

Gift of legacies, and then of "Blackacre and all the residue," &c.

And it would seem that the specific mention in the residuary gift of some of the particulars included in the residue, although such mention precedes the words "and all the residue," &c., will not vary the construction; the specifically-mentioned particulars being still but part of the residue, and the mention of them not being inconsistent with the view that the whole estate, real and personal, is treated as one mass. Thus, in Bray *v.* Stevens, (*e*) where a testator bequeathed certain legacies, and then

(*c*) 7 H. L. Cas. 689, *dub.* Lord Wensleydale. See also Jones *v.* Price, 11 Sim. 557; In re Bellis' Trusts, 5 Ch. D. 504 (where the charge excluded trust estates from the general devise); Gainsford *v.* Dunn, L. R., 17 Eq. 405 (where on this principle pecuniary legacies were held to be appointments out of a fund, the residue of which and of the personal estate were afterwards given.)

(*d*) Wheeler *v.* Howell, 3 K. & J. 198; and see Cross *v.* Kennington, 9 Beav. 150, 15 L. J., Ch. 167.

(*e*) 12 Ch. D. 162. The testator also directed that in a certain event one of the legacies should not be paid, but should

devised and bequeathed "all his freehold estates in the parishes of B., L. and R. and elsewhere in the county of C., and all the residue of his real and personal estate, money, mine shares, chattels and effects of whatsoever kind and wheresoever situate" to trustees on certain trusts applying to the whole, it was held by Sir J. Bacon, V. C., that the legacies were charged on the freehold estates in the parishes of B., L. and R. He dissented from the decision in Castle *v.* Gillett; (*f*) in which Sir R. Malins, V. C., had in a similar case come to a contrary conclusion on the ground that when one thing was specifically mentioned, and the residue was afterwards referred to, it was evident that the testator did *not intend to treat what was specifically mentioned as part of the residue; adding, nevertheless: "The residuary real estate is put on the same footing, and it follows that it is also not charged."

Limits of the rule.

But a gift (after legacies) of "all my real estate and all the residue of my personal estate" plainly treats the different species of estates as two masses, and does not bring the case within Greville *v.* Browne. (*g*)

Of course the rule is not excluded by a direction to the executors (to whom there is no devise of real estate) to pay debts and legacies: such a direction is mere surplusage. (*h*) But the rule is not applicable to a case where the testator first dealing exclusively with his personal estate allots certain portions of it to several objects, and then disposes of the residue of his real and personal estate. Thus, in Gyett *v.* Williams, (*i*) where a testator bequeathed his personal estate in trust to lay out a sum, "part thereof," as therein mentioned, and to invest the residue and stand possessed thereof as to one sum, "part of it," in one way, and of other sums, "other parts of it," in other ways; he then gave some small pecuniary legacies *simpliciter*, and concluded with a gift of all the residue of his estate and effects whatsoever and wheresoever: it was held by Sir W. P. Wood, V. C., that the several sums described as parts of the personal estate were not charged on the realty. This, he thought, would have been clear, but for the pecuniary legacies. It would have been equally clear that these legacies, if they had stood alone, would be charged on the realty. It was said that it was incredible, that the testator should have intended to provide for the smaller

"fall into his residuary estate." This, the V. C. observed, was a strong intimation out of what the legacies were to come, but he did not rest his decision upon it. See also Thorman *v.* Hilhouse, 5 Jur. (N. S.) 563.

(*f*) L. R., 16 Eq. 530.

(*g*) Wells *v.* Row, 48 L. J., Ch. 476.

(*h*) In re Brooke, 3 Ch. D. 630.

(*i*) 2 J. & H. 429.

legacies better than for the larger. But the answer was that one set of legacies was given in a form to which the principle of Greville *v.* Browne directly applied, while the others were not so: and the V. C. decided that he could not alter the construction on any mere conjecture as to what the testator was likely to do.

Legacies not charged on realty by joining realty and personalty in same gift.

And the mere joining in one devise or bequest of the real and personal estate is not of itself enough to charge legacies on real estate. In all the cases some other circumstance has been involved leading to that conclusion. (*k*) And where a testator gave his whole real and personal estate to trustees and executors for *the maintenance and education of his infant son and daughters, and directed that as they attained majority, his property, real and personal, should be divided as follows, viz., a pecuniary legacy to his son, and his property at T. amongst his daughters, it was held that the legacy was not charged on the property at T.] (*l*)

Whether general charge extends to lands specifically devised;

Where a testator has manifested an intention to charge his real estate with the payment of either debts or legacies, the question sometimes arises, whether such charge extends to the specific as well as the residuary lands, or is confined to the latter. 15

in case of legacies;

And first as to legacies. In Spong *v.* Spong, (*m*) where a testator, after specifically devising certain lands to A and other persons, and charging his real and personal estate with his legacies, and then bequeathing some pecuniary legacies, gave the residue of his real and personal estate to A; it was held in D. P. that the legacies were not charged upon the lands specifically devised; for that, in construing charges of this nature, specific and residuary devises, though for many purposes governed by a common principle, were to be distinguished; especially as in the case under consideration the testator had shown such a distinction to be in his view by devising particular lands to the person whom he made residuary devisee. ["By specifically devising or specifically bequeathing any part of his property," said Lord Manners, "the testator intends, as between the objects

(*k*) See Nyssen *v.* Gretton, 2 Y. & C. 222.

(*l*) Bentley *v.* Oldfield, 19 Beav. 225.]

15. General pecuniary legacies are not chargeable upon, or to be preferred to, specific devises of land, although such devise of land be found in *a residuary clause* which includes personalty, Robinson *v.* McIver, 63 N. C. 645; Chase *v.* Davis, 65 Me. 102.

(*m*) 1 Y. & J. 300, 3 Bli. (N. S.) 84, 1 D. & Cl. 365.

of his bounty, to separate that part of his property from the rest, and that it should not be subject to the provisions and operation of his will."

So in Conron *v.* Conron, (*n*) where the testator by will dated in 1836, after making certain specific devises and bequests, gave some pecuniary legacies, and charged "all his real and chattel estates and property of every description," with payment thereof; and subsequently devised "all the residue of all his real and freehold estates, goods, and effects of every kind" to A in fee; it was held in D. P. that the charge of legacies did not extend to the specifically devised estates. "The true rule," said Lord Cranworth, "deducible from Spong *v.* Spong, is that a mere charge of legacies on the real and personal estate (and 'on *all* the real and personal estate' must mean exactly the same thing) does not of itself create a charge on any specific devise or bequest. *I think that the rule is a very reasonable one, and is likely to be in general conformable to the intentions of testators."

Both these cases occurred under the old law. The statute 1 Vict., c. 26 has not diminished the distinction between specific and residuary devises.

In case of debts.

But in both cases legacies only were charged. The reason of the rule as stated by Lord Manners is inapplicable to a charge of debts; (*o*) and where debts and legacies are charged together, the legacies, being placed by the will on an equal footing with the debts, get the benefit of the charge on the specifically devised estates. (*p*)

Where a charge of legacies is effected under the rule in Greville *v.* Browne, (*q*) and there is also a specific devise of realty, the latter is not charged with the legacies, but only the residuary realty. (*r*) On the same principle (it may be presumed,) where a testator made several devises and bequests; and, "charged with his debts and legacies," he devised "all other" his hereditaments to his nephews and nieces; he then by codicil specifically devised a house to his daughter, "it being his wish that she should reside therein if she should think fit;" it was

(*n*) 7 H. L. Cas. 168.

(*o*) See *e. g.*, Harris *v.* Watkins, Kay 438; Mannox *v.* Greener, L. R., 14 Eq. 456.

(*p*) Maskell *v.* Farrington, 3 D., J. & S. 338; and see Rowley *v.* Eyton, 2 Mer. 128, *ante* vol. I., p. *195.

(*q*) *Ante* p. *605.

(*r*) Per Bacon, V. C., 12 Ch. D. 169. Francis *v.* Clemow, Kay 435, is not *contra;* the plaintiff (legatee) claimed only against residue.

held that the house was exempted from the charge of debts and legacies.] (s)

Annuities usually included in a charge of legacies.

It may here be observed, that, under a charge of legacies, annuities will generally be included, (t) unless the testator manifests an intention to distinguish them, (u) as by sometimes using both words. (x)

Direction to raise moneys out of the rents and profits.

II.—It is clear that a devise of the *rents and profits* of land is equivalent to a devise of the land itself, and will carry the legal as well as beneficial interest therein; (y) but the question *which has chiefly given rise to perplexity in reference to these words is, whether a direction or power to raise money out of the *rents and profits* authorizes a sale, (z) the doubt being, whether, in such cases, the testator or settlor, by the words "rents and profits," means the *annual* income only, according to their ordinary and popular signification, or uses the phrase in a more comprehensive sense, as designating the proceeds or "profits" of the inheritance, and, therefore, as impliedly conferring a power to dispose of such inheritance. 16

(s) Wheeler *v.* Claydon, 16 Beav. 169.

(t) Duke of Bolton *v.* Williams, 2 Ves., Jr., 216, cit.; Sibley *v.* Perry, 7 Ves. 522; Bromley *v.* Wright, 7 Hare 334; Ward *v.* Grey, 26 Beav. 485; Mullins *v.* Smith, 1 Dr. & Sm. 204; Nicholson *v.* Patrickson, 3 Gif. 209. So "pecuniary legacy," per Wood, V. C., Gaskin *v.* Rogers, L. R., 2 Eq. 284.]

(u) Shipperdson *v.* Tower, 1 Y. & C. C. C. 441; [Cunningham *v.* Foot, 3 App. Cas. 989 (claim to charge remainder in land whereof annuitant was herself tenant for life.)]

(x) See Nannock *v.* Horton, 7 Ves. 391; [Woodhead *v.* Turner, 4 De G. & S. 429; Gaskin *v.* Rogers, L. R., 2 Eq. 284. But see Heath *v.* Weston, 3 D., M. & G. 601; Ward *v.* Grey, 26 Beav. 485.]

(y) Johnson *v.* Arnold, 1 Ves. 171; Baines *v.* Dixon, Id. 42; Doe *v.* Lakeman, 2 B. & Ad. 42; [and see *ante* ch. XXIV., *ad fin.*

(z) An express prohibition against a sale would generally include a mortgage or other virtual alienation of the estate. See Bennett *v.* Wyndham, 23 Beav. 521. A sale is of course excluded where the expression is "*annual* rents and profits," Marsh *v.* Marsh, 2 Jur. (N. S.) 348; Forbes *v.* Richardson, 11 Hare 354; Scott *v.* Clements, 8 Ir. Ch. Rep. 1; Collier *v.* Walters, L. R., 17 Eq. 252, 258.]

16. Where the legacy was of $20,000—to be paid by the executor—"to be paid annually thereafter from the proceeds arising from the sales of the produce of my farm"—it was held to be a charge upon the real estate, Mitchener *v.* Atkinson. 63 N. C. 585. Where the use and occupation of land is devised to A, "excepting" certain legacies "to be paid out of the same," and after A's death to her children, "subject to the said reservations," the rents and profits will be applied to discharge the land, Morgan *v.* Titus, 2 Gr. Ch. (N. J.) 201.

A devise to A for life, subject to certain annual payments, makes them primarily a charge on the rents and profits, and

[From the earliest times a sale has been admitted] where the purpose was to pay debts and legacies, (*a*) or to raise a portion by a definite period, within which it could not be raised out of the annual rents; (*b*) and this rule was extended by Lord Hardwicke to a case in which the portions, being payable in such manner as a third person should appoint, *might* have become payable within a definite time. (*c*)

Where it authorizes a sale:

where definite time is fixed for payment.

[And notwithstanding the *dicta* of Lord Macclesfield to the contrary, (*d*) the authorities, including a decision by Lord Macclesfield himself, have always inclined, even where no time was specified for payment, to treat a direction to raise a gross sum out of rents and profits as authorizing a sale or mortgage. Thus, in Heycock *v.* Heycock (*e*) Lord Keeper North declared he took it to be the law of the court, that where there was a devise of a sum certain to be raised out of the profits of lands; if the profits would not amount to raise the sum in a convenient time the court would decree a sale. And in Sheldon *v.* Dormer (*f*) Lord Somers remarked that a time

Where no time is fixed.

then, in case of deficiency, on the fee, Clason *v.* Lawrence, 3 Ed. Ch. 48. So a devise to A, followed by the words "the land given to A is hereby pledged for D.'s support," creates a charge to that effect, Comstock *v.* Comstock, 23 Conn. 352.

A will, after directing the personal estate to be sold, and the real estate leased until the rents, with the proceeds of the sale of the personal property, should be sufficient to pay the after-named legacies, contained the following provision: "I will and bequeath to my sister Isabel the sum of 50 dollars annually, to be paid out of the rents of the place and the proceeds of the sale of my personal property, and continued until the following sums are paid." The will then gave several legacies, and directed that after their payment the real estate should be sold and a distribution made. It was held, that in each year the $50 were to be paid to Isabel before any payment to the other legatees, Parks *v.* Perry, 2 Blackf. 74.

(*a*) Lingon *v.* Foley, 2 Ch. Cas. 205; Anon., 1 Vern. 104; Berry *v.* Askham, 2 Vern. 26; Rawlings *v.* Brotherson, Ex. 1783, cit. 2 Ves., Jr., 480 [(as to which *qu.*, the expression there being "*annual* rents and profits.") See also Talbot *v.* Earl of Shrewsbury, Pre. Ch. 394; Metcalfe *v.* Hutchinson, 1 Ch. D. 590.]

(*b*) Sheldon *v.* Dormer, 2 Vern. 310; Warburton *v.* Warburton, Id. 420; Jackson *v.* Farrand, Id. 424; Gibson *v.* Lord Montfort, 1 Ves. 491; Okeden *v.* Okeden, 1 Atk. 550. Some parts of Lord Hardwicke's judgment in this case are irreconcilable. He is made in one place to assume that the portion was to be raised at the period of vesting, and in another to state the contrary. It seems difficult to support the latter hypothesis. And see Hall *v.* Carter, 2 Atk. 354; [Backhouse *v.* Middleton, 1 Ch. Cas. 173, 176.]

(*c*) Green *v.* Belcher, 1 Atk. 505. See also Allan *v.* Backhouse, 2 Ves. & B. 65, stated *post* p. *616.

[(*d*) Ivy *v.* Gilbert, Pre. Ch. 583, 2 P. W. 13; Mills *v.* Banks, 3 P. W. 1.

(*e*) 1 Vern. 256.

(*f*) 2 Vern. 311.

being there fixed for payment made the case stronger than those in which without that circumstance, the court had frequently decreed a sale, *to raise a sum of money charged by the will on the rents and profits.

So, in Stanhope *v.* Thacker, (*g*) where by settlement a remainder was limited to the daughters of the marriage till they should out of the rents, issues and profits have raised and received the sum of £3000; Lord Cowper, after deciding that this remainder was in the nature of a security for the money, said that, if the ordinary or annual rents and profits of the land would not raise the money in a convenient time to answer the intent of the settlement, which was to provide portions for the daughters, the same might be decreed in a court of equity to be raised by a sale or mortgage thereof, which were the extraordinary profits of the same lands.

Again, in Trafford *v.* Ashton, (*h*) the trust of a term limited by a marriage settlement was declared to be out of the rents and profits to raise £8000 for the daughters of the marriage, to be paid them as soon as conveniently could be (without appointing a definite time for payment); and Lord Macclesfield decreed that they should be raised by sale or mortgage.

And succeeding judges,] looking at the inconvenience of raising a large sum of money by a gradual accumulation of the annual profits as they arise, [have acquiesced in and acted upon the doctrine of these early cases.] Thus, in Green *v.* Belcher, (*i*) Lord Hardwicke stated the rule to be, that, "where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning, and to confine them to the receipt of the rents and profits as they accrue, the court, in order to obtain the end which the party intended by raising the money, has, by the liberal construction of these words, taken them to amount to a direction to sell; and, as a devise of the rents and profits will at law pass the lands, (*k*) the raising by rents and profits is the same as raising by sale."

Lord Hardwicke's *dicta.*

So, in Baines *v.* Dixon, (*l*) the same eminent judge observes that "the court has gone by several gradations. When any particular time is mentioned within which the estate would not afford the charge, the court directed a sale, and then went farther, till a sale was directed on

(*g*) Pre. Ch. 435.
(*h*) 1 P. W. 415.]
(*i*) 1 Atk. 505.
(*k*) See *ante* p. *609.
(*l*) 1 Ves. 42.

the words 'rents and profits' alone, when there was nothing to exclude or express a sale;" though he admitted that there was not one case in ten where it had been agreeable to the testator's intention. Lord Hardwicke *held, however, that, in the case before him, where legacies were to be paid with all convenience as the profits of the estate should advance the money, the word "advance" limited it to annual profits. (m)

The same opinion, too, seems to have been entertained by Lord Thurlow, who in Countess of Shrewsbury v. Earl of Shrewsbury, (n) said, "If a term was created to raise by the rents and profits, I should say it might be done by sale or mortgage." Lord Eldon, also, in Bootle v. Blundell, (o) observed that he had understood it to be "a settled rule, that where a term is created for the purpose of raising money out of the rents and profits, if the trusts of the will require that a gross sum should be raised, the expression 'rents and profits' will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mortgage." These quotations controvert the position advanced by some respectable writers, that annual rents is the primary meaning of rents and profits; they show the rule of construction to be rather the reverse, (p) and

Lord Thurlow's and

Lord Eldon's opinion.

Position of text writers.

(m) See also Okeden v. Okeden, 1 Atk. 550; Ridout v. Earl of Plymouth, 2 Atk. 104; and Gibson v. Lord Montfort, 1 Ves. 490.

(n) 1 Ves., Jr., 234.

(o) 1 Mer. 233.

(p) *Vide* Cox's note to Trafford v. Ashton, 1 P. W. 418; Raithby's note to Anon., 1 Vern. 104; and Belt's Suppl. to Ves. 221. Lord Hardwicke's inclination to hold a direction to pay out of rents and profits to authorize a sale.—Mr. Belt's observation, that Lord Hardwicke, in Conyngham v. Conyngham, 1 Ves. 522, (more fully stated Suppl. 221,) seems to have thought that his predecessors had gone too far in holding that money to be raised out of rents and profits might be raised by a sale, is quite at variance with the general tenor of his lordship's judgments, which [are as much] in favor of a sale [as those of] any of his predecessors, and may be considered to have established the present doctrine upon the subject. In the particular case referred to, it is true, he held the charge to affect the annual income only; but the will was so clear on this point, that, with all his partiality to the opposite construction, it was impossible that he could come to any other conclusion. The testator devised his plantation and lands to trustees and their heirs, in trust for payment of his funeral expenses, debts and legacies, and to keep the plantation in good repair, and to keep the negroes, with their increase, and the stock thereon, in as good a condition as they were in at his death, out of the rents and profits; and he directed that the produce of his estate should be [from time to time] shipped as C., one of his two trustees, should direct, until his (testator's) funeral charges, debts and legacies should be paid; and he gave C. power out of the said produce, as the same should be remitted, to pay his debts and legacies. [And the better to secure such consignments, he directed all who should inherit

that these words are to be taken in their widest sense, namely, as authorizing a sale, unless restrained by the context; but perhaps it more accords with the principle of the authorities to say, that the signification of the phrase is governed wholly by the nature of the purpose for which the money is to be raised, and the general tenor of the will.

General doctrine of the authorities.

*If the testator or settlor manifests by the context of the instrument that he contemplates the identical subject, out of whose "rents and profits" the money shall have been raised, being afterwards enjoyed by the devisees, or remaining otherwise available for the purposes of the will, it is evident that he intends the current annual income only to be applied; for by such means alone can the raising of the money be made consistent with the preservation of the entire subject of disposition. (q)

Exception where estate is treated as existing entire after raising of debts.

So, if the testator treats the raising of the money as a process requiring time, and defers a devisee's perception of the rents or an annuitant's receipt of his annuity of them until such purpose shall have been accomplished, the irresistible inference is, that the testator intends the money to be raised by a gradual appropriation of the rents and profits as they arise, and not in a mass by sale or mortgage.

Thus, in Small *v.* Wing, (r) where a testator devised to his eldest son certain premises held for a short term and directed him to pay his executors £250 per annum during the term. The testator devised to his executors the rents, issues and profits of his other lands, in trust that they should therewith, and with the annuity, raise and pay all the testator's debts; but if the trustees should neglect to receive the rents or apply them towards the payment of the testator's debts, then the power to cease; and then he appointed A, B and C to be his trustees to receive the annuity and the profits of the premises for the payment of his debts, until the same and certain legacies should be raised and satisfied: and the testator devised all his lands in M. (subject to an annuity) to the testator's wife during her life, to commence after the payment of the testator's debts. He gave other lands to his

Rents and profits confined to annual profits by the effect of particular expressions.

his plantation to send an account every year of the produce thereof.] Lord Hardwicke thought himself not warranted to decree a sale; it happened, he said, to be sometimes attended with inconvenience, as in Ivy *v.* Gilbert, 2 P. W. 13; but he could not go further unless there was some other right of encumbrance.

(q) See Wilson *v.* Halliley, 1 R. & My. 590.

(r) 5 B. P. C. Toml. 66.

son John and his heirs, and declared it to be his will, that neither of his sons should enter on or receive to his own use the rents of the premises to them respectively devised until all his (the testator's) debts should be paid, [and that until they should be paid his trustees should let and set the premises for the best rents for raising and paying the debts; (s) but that either of his sons might pay off his proportion and thereupon enter.] Lord Macclesfield held that the debts should be raised out of the yearly rents without a sale; and the decree was affirmed in D. P.

Effect where "residue" of rents and profits is given.

Such also is the effect when the testator proceeds to direct *that the *residue* of the rents and profits (after answering the charge) shall be paid over to the devisee *for life;* especially if he has included annuities in the charge, these being, from their nature, evidently intended to come out of the annual income. (t) The latter circumstance, however, was by Lord Hardwicke considered to be inconclusive in Okeden *v.* Okeden, (u) where the trustee of a term for years was to receive the rents and profits, and apply part thereof for raising £5000 for A, if he should live to attain twenty-five, and other part in paying certain charges; and though the other charges were clearly of a nature which must have been intended to come out of the annual profits (being for the maintenance of A and his elder brother (the devisee of the land), until twenty-five, (x) and making repairs, and to pay an annuity), yet his lordship was [strongly inclined that the estate should be sold] for raising the portion, if the rents during the minority of the devisee did not amount to the sum. [The point, however, was not decided.] (y)

Rule where some of the prescribed purposes require a sale, and some not

Where some of the purposes for which the money is to be raised require a sale, and others do not, there might seem to be ground to contend, that, as the testator has not drawn any line of distinction between them in regard to the mode of raising the money, the whole is raisable in one manner.

[(s) As to the direction to raise by lease, see *infra* p. *616.]

(t) Heneage *v.* Lord Andover, 3 Y. & J. 360 [cited by Wood, V. C., in Forbes *v.* Richardson, 11 Hare 354. See also Taylor *v.* Emerson, 2 Con. & Law. 558, where, however, the words were "out of the interest proceeds or annual rents." And that annuities are charges on income, see Scholefield *v.* Redfern, 2 Dr. & Sm. 173.]

(u) 1 Atk. 550.

[(x) But in Torre *v.* Browne, 5 H. L. Cas. 555, where a term was limited to provide £200 annually for the maintenance of the testator's children, it was held that the whole interest in the term was charged.

(y) 1 Atk. 552, n. (3) by Sanders.]

In Wilson *v.* Halliley, (*z*) however, where debts and legacies were to be raised out of rents and profits, Sir J. Leach, M. R., treated it as clear, that, though a sale might have been effected if necessary for the purpose of liquidating the debts, the conclusion from the whole will (which was very long) was, that the legacies, though payable at definite periods, were raisable out of the annual rents only. He relied much on the circumstance that the estates (the rents and profits of which were made applicable to this purpose) were afterwards devised "subject to the receipt of the rents and profits thereof by my said trustees and executors for the purposes aforesaid."

Clear context required to negative sale for debts.

[Referring to this case, Sir G. Jessel, M. R., said, (*a*) "Sir J. Leach read the words 'rents and profits' differently as applied to the debts and as applied to a gross sum which the testator directed *to be raised by way of bounty, meaning that as the debts must be paid the testator never could intend that the creditors were to wait." And this distinction in regard to debts he thought would be stronger in the case of a modern will, where the creditors can resort to the real estate as a matter of right, and that it would be a very strange intention to impute to a testator that he should by his will intend to delay the creditor, having no legal right so to do. The context might show that he did so intend; but, considering the absurdity of the intention, the context must be plain.

Sale notwithstanding gift of "remainder of rents and profits."

In Metcalfe *v.* Hutchinson, (*b*) the testator directed his debts to be paid out of the rents and profits of his real and personal estate, and after the debts were paid that the *remainder* of the rents and profits should be paid for life, with remainder over in fee; and it was held by Sir G. Jessel that the words directing payment of the remainder were not sufficient to exclude the general rule that a direction to pay out of rents and profits meant *prima facie* out of the estate. Here "rents and profits" necessarily meant the *corpus* in the gift of the remainder.

To exclude the rule where, subject to a charge of debts or of gross sums, the estate is devised for life, with remainder over, involves another improbability, viz., that the testator intended to throw the whole burden on the tenant for life. This point was glanced at in Harper *v.* Munday. (*c*) But aggrandizement of the estate is not un-

(*z*) 1 R. & My. 590.

[(*a*) Metcalfe *v.* Hutchinson, 1 Ch. D. 591.

(*b*) 1 Ch. D. 591.

(*c*) 7 D., M. & G. 369, 373, 375. See also Lord Londesborough *v.* Somerville, 19 Beav. 295, where the charge was of legacies, to be paid within three months.

frequently the primary object of a testator to which the interests of the immediate devisee are postponed. (*d*) This is strongly indicated where accumulation of the rents is ordered as the mode of raising the debts.] (*e*)

Where the direction is to raise out of the rents and profits, *or* by sale or mortgage, it is obvious that these words (being evidently used in contradistinction) cannot mean the same thing; rents and profits, therefore, must import annual rents and profits; and if, in such a case, the charges to be raised by these respective modes are of two kinds, one annual, and the other in gross, the words will be distributed, the annual charges being raisable out of the annual rents, and the sums in gross by sale or mortgage. (*f*)

Direction to raise out of the rents and profits, or by sale or mortgage.

*Of course, where the direction is to raise a sum of money by leases for lives or years *at the old rent*, the intention to confine the charge to annual rents is beyond all doubt. (*f*) [So where portions are to be raised by making a lease, which is directed to cease as soon as the portions are raised; since, if they were raised by sale or mortgage, the term must continue for the benefit of the purchaser or mortgagee. (*g*) And in a settlement which contained a charge in these terms, and another to be effected by "lease, mortgage, or otherwise," a third clause giving a power to raise portions by lease (without more,) was held to be confined by the context to annual rents.] (*h*)

Direction to raise by lease

Provisions for the renewal of leases out of the rents and profits often give rise to the point under consideration. In such cases, if the terms of renewal are such that the fine may be called for suddenly, so as to render the raising of it out of the annual rents impossible or inconvenient, a strong argument is afforded for holding the words to authorize a sale or mortgage. Indeed, this

As to raising fines for renewal of leases.

(*d*) As, where the testator has no immediate descendants, and the first takers are collaterals, Lord Lovat *v.* Duchess of Leeds, 2 Dr. & Sm. 62: the intention was express, "by rents and profits but not by sale or mortgage," and it was held that timber-money was not charged, Id. 75.

(*e*) See Tewart *v.* Lawson, L. R., 18 Eq. 490, 494.]

(*f*) Playters *v.* Abbott, 2 My. & K. 97; see also Ridout *v.* Earl of Plymouth, 2 Atk. 104, where debts and legacies were to be raised "by perception of the rents, or by leasing or mortgaging."

(*f*) Ivy *v.* Gilbert, 2 P. W. 63, Pre. Ch. 583. See also Ridout *v.* Earl of Plymouth, 2 Atk. 104; [Mills *v.* Banks, 3 P. W. 1.

(*g*) Evelyn *v.* Evelyn, 2 P. W. 659, 670.

(*h*) Id.]

construction prevailed in a modern case, in spite of some expressions in the context rather strongly pointing the other way.

Expenses of renewed lease to be paid out of rents and profits.

Thus, in Allan *v.* Backhouse, (*i*) where the testator, after devising certain leasehold estates *held upon bishop's leases for lives*, and all other his real estate, to certain uses, directed the renewal of the leaseholds, and that the expenses should be raised *out of the rents and profits* of the leasehold premises, or of any part of the freehold estates; and he declared that the renewed leases should be held upon the same trusts as were declared of the freehold and copyhold estates, *to the end that they might be enjoyed therewith so long as might be;* Sir T. Plumer, V. C., held that, as the purpose for which the money was to be raised out of the rents and profits might require it suddenly (for the lessor could not be expected to wait for the gradual payment out of the rents,) and as there was nothing in the will to give to these words the abridged sense of annual rents and profits, except the purpose to preserve the estate entire (which his Honor thought warranted the sacrificing of part for the preservation of the re*mainder,) the money might be raised by sale or mortgage. (*k*) [This decision was affirmed by Lord Eldon.] (*l*)

Sale decreed.

(*i*) 2 Ves. & B. 65. [See Garmstone *v.* Gaunt, 1 Coll. 577.]

(*k*) This is a very compressed statement of the grounds of his Honor's judgment, in which he reviewed the principal authorities.

As to the mode of contribution towards renewal-fines by tenant for life and remainderman, see 9 Jarm. Convey. 347; and to the authorities there cited add Shaftesbury *v.* Duke of Marlborough, 2 My. & K. 111; Greenwood *v.* Evans, 4 Beav. 44. In the former case, the fact of the testator having made a provision for raising the fine was allowed an influence upon the question of contribution to which it has not commonly been considered as entitled. [See also Hudleston *v.* Whelpdale, 9 Hare 775; Mortimer *v.* Watts, 14 Beav. 616.

(*l*) Jac. 631.]

*CHAPTER XLVI.

ADMINISTRATION OF ASSETS, EXONERATION OF DEVISED LANDS, EXEMPTION OF PERSONALTY, MARSHALING OF ASSETS, &C.

I.—*Several Species of Property liable to Creditors.—Order of their Application.—Contribution to Charges—where thrown on mixed Fund.*

II.—*Charges upon Estates, when to be paid out of other Funds.—General Rules.—Distinction where the Mortgage is created not by the Testator, but by a prior Owner,—where Mortgage Money never went to augment Mortgagor's Personal Estate.—Stat.* 17 *and* 18 *Vict., c.* 113.

III.—*What a sufficient indication of a Testator's intention to exempt the Personal Estate from its primary Liability to Debts, &c.*

IV.—*As to marshaling assets in favor of Creditors and Legatees.*

What funds liable to creditors.

I.—Where a testator possessed of property of various kinds dies indebted, having disposed of his estate among different persons, or not having made any disposition, it often becomes material to consider the order, and sometimes the proportions and mode, in which the several subjects of property are applicable to the liquidation of the debts; for every description of property is (we have seen) now constituted assets. (*a*) [1]

(*a*) *Vide ante* p. *583.

1. In Alabama, real property can be subjected to the payment of testator's debts by bill in equity, Sanders *v.* Godley, 23 Ala. 473. So, too, in Maryland, Wyse *v.* Smith, 4 Gill & J. 295. But in order to authorize the Chancellor to pass a decree for sale of real estate to pay debts, the bill must allege an insufficiency of personal assets, which allegation must be either admitted or proved, Id. But see Tessier *v.* Wyse, 3 Bland Ch. 28. In Pennsylvania by suit and judgment against the executor, Fritz *v.* Evans, 13 Serg. & R. 14.

And in most of the states, by action against heirs and devisees, or by Orphans' Court proceedings, on application of the executor or administrator, the lien of decedent's debts upon his lands being generally limited to a short period after his death, beyond which time the land cannot be reached in the hands of a *bona fide* purchaser from the heir. This is regulated by the statutes of the several states.

But it was said, in Illinois, that, there being no statute of limitations on the subject, it would be held that seven years from the death of an intestate would be

And the same question may arise in regard to pecuniary legacies, where the testator has thrown them upon the land or some specific fund which would be either not liable or not exclusively liable to them; for otherwise they are payable out of but one fund, namely, the general personal estate. (*b*) [2]

As to legacies.

sufficient time to bar such a claim, McCoy *v.* Morrow, 18 Ill. 519; Rosenthal *v.* Renick, 44 Id. 202.

The facts in each case must determine what limitation of time is to be applied, Rosenthal *v.* Renick, *ubi supra;* Moore *v.* Elsworth, 51 Ill. 308. "Reflection and experience both teach the extreme difficulty of prescribing any fixed rule which would, in general, operate safely and justly. This lesson is more impressively taught by the very wide conclusions to which enlightened courts have been led. * * A convenient time for one would for another be very inconvenient. The time reasonable, according to the situation of one estate, would in another, be very unreasonable," Ewing, C. J., in Liddel *v.* McVickar, 6 Halst. 44, 56. But where the testator died in Ohio, leaving lands in Illinois, which lands had not been aliened or improved at the time of action brought, and the estate was still unsettled in Ohio, it was held that such claim might be enforced against the land in Illinois even after the lapse of seven years, Rosenthal *v.* Renick, *ubi supra.* So too where the claim had, *ad interim*, been in litigation, and the real estate remained in the heirs and no equities had intervened, Moore *v.* Ellsworth, *ubi supra.*

In Post *v.* Mackall, 3 Bland Ch. 486, 515, Bland, C., says: "It is believed that although the real estate of a deceased debtor may be subjected to the payment of his debts in most of the states of this Union, yet in each one the mode of administering such assets is materially different. The general creditors have, in some states, greater difficulties to encounter than in others; the right of preference and the classification of creditors varies; and in some the real assets are within reach of all, while in other states creditors of only a particular description are allowed to resort to them."

Foreign lands are not assets in the hands of executors for the payment of debts, Payne *v.* Logan, 4 Bibb 402; Austin *v.* Gage, 9 Mass. 395. "With us land is assets for all sorts of debts, no distinction being made between simple contract debts and debts by specialty," Wagner, J., in Brant's Will, 40 Mo. 266, 280.

But in Missouri, upon the failure of personal assets, and after the final settlement of the administration, lands cannot be reached, for the payment of debts, by bill in equity, Titterington *v.* Hooker, 58 Mo. 593.

(*b*) Greaves *v.* Powell, 2 Vern. 248. The distinction taken in Walker *v.* Meager, 2 P. W. 550, has long been overruled.

2. Ordinarily, the personal estate is the fund from which pecuniary legacies must be paid, Laurens *v.* Read, 14 Rich. Eq. 245. Legacies are not payable out of the real property, unless so charged, Goodwin *v.* Chaffee, 4 Conn. 166; Ellis *v.* Page, 7 Cush. 163; Hubbell *v.* Hubbell, 9 Pick. 561; Sims *v.* Sims, 2 Stockt. 161; Pell *v.* Ball, Speer's Eq. 518. And notwithstanding such charge, the personal property is primarily liable, Tole *v.* Hardy, 6 Cow. 333. And though a legacy may be charged upon real estate, the personal property, if originally sufficient, is alone liable, and if it has been squandered by the executor, this throws no liability on the land, Sims *v.* Sims, *ubi supra.* And this is true even as to debts, if the waste has been by neglect or sufferance of the creditor, Goodhue *v.* Barnwell, Rice (S. C.) 240. Where, however, general lega-

Under a trust for the payment of debts they are paid, not in the order of their legal priority, (c) but according to the rule of a court of equity, which, regarding "equality as equity," places the creditors of every class on an equal footing; (d) and this rule is now established to apply, in opposition to the old doctrine, to mere charges by which the descent is not broken, (e) *and to devises in trust for the payment of debts, though made to the same persons as are constituted executors. (f) In all such cases, therefore, specialty and simple contract creditors [always came] in *pari passu;* and it was held that specialty creditors, claiming the benefit of such a trust or charge, must admit the simple contract creditors to an equal participation even of the personal estate, (g) as equity will not allow a creditor to share in the equitable assets, or, in other words, in that portion of the property which is distributable according to the maxims of a court of equity, without relinquishing his legal priority in regard to that portion of the property which constitutes legal assets. [The practical importance of these distinctions is, however, greatly reduced by the act 32 and 33 Vict., c. 46, which abolishes the legal priority of specialty over simple contract creditors; for it is between these two classes that questions of priority have generally arisen.]

Creditors admitted *pari passu* under trusts and charges.

It is clear that a trust to pay, or a charge of, debts, does not make simple contract debts carry interest, (h) or revive a debt which has been

cies are charged on the real estate, a specific legacy is not liable for their payment, Taylor v. Dodd, 58 N. Y. 335.

(c) As to the legal order of paying debts, see Wms. Ex'rs, p. 995, (8th ed.); Ram on Assets 1.

[(d) But a testator may give priority under such a trust to simple contract creditors, Millar v. Horton, Coop. 45.]

(e) Burt v. Thomas, cit. 7 Ves. 323; Batson v. Lindegreen, 2 B. C. C. 94; Bailey v. Ekins, 7 Ves. 319; [Shippard v. Lutwidge, 8 Ves. 26; Barker v. May, 9 B. & Cr. 489]; overruling Freemoult v. Dedire, 1 P. W. 430; Plunket v. Penson, 2 Atk. 290.

(f) Newton v. Bennett, 1 B. C. C. 135, and cases cited Id. 138, 140, n.; [Chambers v. Harvest, Mose. 123.] See also Prowse v. Abingdon, 1 Atk. 484; Lewin v. Okeley, 2 Atk. 50; [Clay v. Willis, 1 B. & Cr. 364]; overruling Girling v. Lee, 1 Vern. 63, and several other early cases.

(g) Wride v. Clarke, 1 Dick. 382; Deg v. Deg, 2 P. W. 412; Haslewood v. Pope, 3 P. W. 323; Morrice v. Bank of England, Cas. temp. Talb. 220, 2 B. P. C. Toml. 465, 3 Sw. 573. See also Sheppard v. Kent, 2 Vern. 435, 1 Eq. Cas. Ab. 142, pl. 6.

(h) Lloyd v. Williams, 2 Atk. 110; Barwell v. Parker, 2 Ves. 363; Earl of Bath v. Earl of Bradford, Id. 587; Shirley v. Earl Ferrers, 1 B. C. C. 41. [Whether a charge of another's debts carries interest on interest-bearing debts depends on the terms of the will, Askew v. Thompson, 4 K. & J. 620.]

barred by the statutes of limitations; (*i*) though the contrary of both these propositions has been heretofore maintained. (*k*) And in Tait *v.* Lord Northwick (*l*) Lord Loughborough held that a direction to pay such debts as the testator should at the time of his death owe by mortgage bond or other specialty, or by simple contract or otherwise however, *and all interest thereof*, was confined, in respect of the interest, to debts which carried interest.

Direction to pay interest confined to debts carrying interest.

But it should be observed that property which the testator has not subjected to debts is not distributable as equitable assets *merely because it is an object of equitable jurisdiction. [The true principle is that whatever the executor will be charged with as assets in an action at law against him by a creditor, whether it be recoverable by the executor as against a third person in a court of law or only in a court of equity, provided he so recover it merely *virtute officii* as executor, is legal assets. (*n*) And therefore the trust of all chattels, real as well as personal, (*o*) is legal assets, though recoverable only in equity. Formerly an equity of redemption of leaseholds was supposed to be equitable and not legal assets: (*p*)[3] but this apparently rested on the precarious nature in former times

Equitable interests not necessarily distributable as equitable assets.

Trust of chattels is legal assets,

— including equity of redemption of leaseholds.

(*i*) See Burke *v.* Jones, 2 Ves. & B. 275. [If the statute has not run at the testator's death, a charge of a debt on the testator's real estate prevents the debt being barred by the statute, a charge being a trust to be executed by the devisee or heir, Hargreaves *v.* Michell, 6 Mad. 326; Moore *v.* Petchell, 22 Beav. 172; but a charge of a debt on leaseholds or other personalty does not alter the rights of the creditor, and the statute runs notwithstanding, Scott *v.* Jones, 4 Cl. & Fin. 382; Freake *v.* Cranefeldt, 3 My. & Cr. 499.]

(*k*) Carr *v.* Countess of Burlington, 1 P. W. 228; Blakeway *v.* Earl of Strafford, 2 P. W. 373, 6 B. P. C. Toml. 630.

(*l*) 4 Ves. 816.

[(*n*) Cook *v.* Gregson, 3 Drew. 547; Shee *v.* French, Id. 716; Att.-Gen. *v.* Brunning, 8 H. L. Cas. 243, where held that purchase money due to the testator for land contracted to be sold but not conveyed by him are legal assets. The separate estate of a married woman is necessarily distributable as equitable assets, since she is incapable of binding herself by specialty, Anon., Mose. 328. In this case, it was held that a mortgagee had no preference, since a *feme coverte* by law could not make a mortgage. It is clear that such is not the law now, see Macqueen Husb. & Wife, pp. 300, 304.

(*o*) See cases cited by Cox, 3 P. W. 344, n. (2).

(*p*) Case of Sir C. Cox's Creditors, 3 P. W. 342; Hartwell *v.* Chitters, Amb. 308.]

3. At common law an equity of redemption is not within reach of legal execution or attachment, Van Ness *v.* Hyatt, 13 Pet. 294. This rule is changed in many states by statute, and has disappeared in others with the distinction between legal and equitable rights and remedies.

of the mortgagor's interest in the property, (q) and would be otherwise determined now that the mortgagor is looked upon as the real owner of mortgaged property, subject only to the security in the mortgagee. (r)

As to freehold lands, we have already seen that these were assets in the hands of the heir to answer those specialty debts in which the heir was expressly bound; but no further. (s) Freehold lands held upon a simple trust for the debtor, which but for the statute of frauds (t) would have been equitable assets, were by that statute made liable at law in the hands of the heir, executor or administrator, (u) and by subsequent statutes were also made liable at law in the hands of the devisee, (x) for payment of the specialty debts of the *cestui que trust* which bound his heirs. But the case was otherwise where there was no clear and simple trust: (y) thus an equity of redemption of freeholds was equitable assets. (z) Here the creditor (not the executor, who indeed had no *locus standi* at all) was compelled to *come into equity for relief, and was therefore obliged to submit to the rule of that court with regard to assets.

Simple trust of freeholds made legal assets by statute of frauds;

—but not an equity of redemption.

But by stat. 3 and 4 Will. IV., c. 104 (a) an equity of redemption of freehold (b) or copyhold (c) land was made legal assets.

***Contra* since 3 and 4 Will. IV., c. 104.**

An equity of redemption is liable to seizure on execution at law, but only in such proportion as the amount of the execution bears to the value of the whole equity, making the execution creditor a tenant in common to that extent with the owner of the equity, Hobart *v.* Frisbie, 5 Conn. 592. And by statute such estates are made liable to attachment and execution at law in Massachusetts, Ingersoll *v.* Sawyer, 2 Pick. 276; Carpenter *v.* First Parish, 7 Id. 49; and Pennsylvania, Gano *v.* Thompson, 7 Watts 416. And it has been held that an equity of redemption prior to the mortgage falling due is legal assets in the hands of the heir, Roosevelt *v.* Fulton, 7 Cow. 71.

[(q) Not because it was the subject of equitable jurisdiction, for in the same case Sir J. Jekyll said that the trust of a bond or of a term was legal assets, 3 P. W. 342.

(r) Cook *v.* Gregson, 3 Drew. 547.

(s) *Ante* p. *582.

(t) 29 Car. II., c. 3, §§ 10, 12.

(u) Plunket *v.* Penson, 2 Atk. 293; King *v.* Ballett, 2 Vern. 248.

(x) 3 and 4 Will. & M., c. 14, and 11 Geo. IV. and 1 Will. IV., c. 47; Coope *v.* Cresswell, L. R., 2 Ch. 112.

(y) See Sugd. V. & P. 654, 657, (11th ed.)

(z) Plunket *v.* Penson, 2 Atk. 294; Plucknett *v.* Kirk, Id. 411; Solley *v.* Gower, 2 Vern. 61; Clay *v.* Willis, 1 B. & Cr. 374. Bayley, J., 1 B. & Cr. 371, and Cranworth, V. C., 15 Jur. 73, seem to have thought that an equity of redemption was not assets, either at law or in equity.

(a) *Ante* p. *583.

(b) Foster *v.* Handley, 1 Sim. (N. S.)

(c) Burrell *v.* Smith, L. R., 9 Eq. 443.

Judgment creditors have a right to redeem, and therefore priority, though assets equitable.

In Sharpe *v.* Earl of Scarborough (*d*) judgment creditors were held entitled to have their debts paid out of the produce of the sale of mortgaged estates in priority to the claims of other creditors by bond and simple contract; but this was on the ground that the judgment creditors had a right to *redeem* and not on account of the nature of the assets; and since a judgment upon which execution has been issued now operates as a charge on every interest (*e*) in land, creditors having such judgments are entitled to payment out of such interest in priority to all other creditors.]

Right of the creditor to take property out of its proper order.

It may be further premised that the order in which the several funds liable to debts are to be applied, regulates the administration of the assets only among the testator's own representatives, devisees and legatees, and does not affect the right of the creditors themselves to resort in the first instance to all or any of the funds to which their claim extends, though as we shall presently see, equity takes effectual steps to prevent the established order of application from being eventually deranged by the capricious exercise of this right.

Effect of exercising power of appointment.

It should also be stated that [real or personal] property over which the testator has a general power of appointment only (and in which he takes no transmissible interest in default of appointment,) is assets for the payment of creditors, (*f*) provided the power be exercised, (*g*) but not otherwise; (*h*) [except in the case of judgment creditors since the act 1 and 2 Vict., c. 110 (*i*) who *have issued execution upon their judgments (*k*) whereby lands

200, better reported 15 Jur. 73; Lovegrove *v.* Cooper, 2 Sm. & Gif. 271. In the latter case it is not directly stated, but would appear from the third paragraph, p. 271, that the real estate was mortgaged; the grounds of the decision could not have been applied to the moneys arising from the sale of this real estate, see *ante* p. *619, note (*f*).

(*d*) 4 Ves. 538.

(*e*) See 27 and 28 Vict., c. 112.

(*f*) Including simple contract creditors under stat. 3 and 4 Will. IV., c. 104, Fleming *v.* Buchanan, 3 D., M. & G. 976.]

(*g*) Lascelles *v.* Lord Cornwallis, 2 Vern. 465, Pre. Ch. 232; Troughton *v.* Troughton, 3 Atk. 656; Lord Townsend *v.* Windham, 2 Ves. 8; [Jenney *v.* Andrews, 6 Mad. 264; Fleming *v.* Buchanan, 3 D., M. & G. 976; Williams *v.* Lomas, 16 Beav. 1. And property which *feme coverte* has general power to appoint by deed or will (London Chartered Bank of Australia *v.* Lempriere, L. R., 4 P. C. 572; Mayd *v.* Field, 3 Ch. D. 587), or by will only (In re Harvey's Estate, 13 Ch. D. 216), is assets to answer her "general engagements" to the same extent as her separate property.]

(*h*) Holmes *v.* Coghill, 7 Ves. 499, 12.

[(*i*) Sects. 11, 13.

(*k*) 27 and 28 Vict., c. 112.]

over which the debtor has a disposing power, which he might without the assent of any other person exercise for his own benefit, are bound in favor of such creditors whether the power be exercised or not:] and, it will be remembered that, in wills made or republished since 1837, every general or residuary devise or bequest operates as a testamentary appointment, unless a contrary intention appear.

Order in which funds to be applied.

The order of the application of the several funds liable to the payment of debts, then, is as follows:—

1. The general personal estate (*l*) not expressly or by implication exempted. (*m*)

2. Lands expressly devised to pay debts, whether the inheritance, or a term carved out of it, be so limited. (*n*)

3. Estates which descend to the heir, (*o*) whether acquired before or after the making of the will. (*p*)

4. Real or personal property devised or bequeathed, [either to the heir or a stranger,] charged with debts, and disposed of, subject to such charge. (*q*)

5. General pecuniary legacies *pro rata*. (*r*)

(*l*) Sir Peter Soames' Case, cit. 1 P. W. 694; Lord Gray *v.* Lady Gray, 1 Ch. Cas. 296; White *v.* White, 2 Vern. 43; Johnson *v.* Milksop, Id. 112; Evelyn *v.* Evelyn, 2 P. W. 664. See also Milnes *v.* Slater, 8 Ves. 304.

(*m*) See *post*, § 3 of this ch.

(*n*) Anon., 2 Vent. 349; Bateman *v.* Bateman, 1 Atk. 421; Lanoy *v.* Duke of Athol, 2 Atk. 444; Powis *v.* Corbet, 3 Atk. 556, 3 Ves. 116, n.; Ellison *v.* Airey, 2 Ves. 569; Tweedale *v.* Coventry, 1 B. C. C. 240; Coxe *v.* Bassett, 3 Ves. 155; [Phillips *v.* Parry, 22 Beav. 279.]

(*o*) Chaplin *v.* Chaplin, 3 P. W. 368; Galton *v.* Hancock, 2 Atk. 424, *et seq.*; [Bainton *v.* Ward, 2 Atk. by Sanders, 172, n. (2)]; Manning *v.* Spooner, 3 Ves. 117; Barnewall *v.* Lord Cawdor, 3 Mad. 453.

(*p*) See Milnes *v.* Slater, 8 Ves. 295.

(*q*) Wride *v.* Clarke, 2 B. C. C. 261, n.; Davies *v.* Topp, Id. 259, n.; Donne *v.* Lewis, Id. 257; Manning *v.* Spooner, 3 Ves. 117; Harmood *v.* Oglander, 8 Ves. 124; Milnes *v.* Slater, Id. 306; Watson *v.* Brickwood, 9 Ves. 447; Irvin *v.* Ironmonger, 2 R. & My. 531.

(*r*) Clifton *v.* Burt, 1 P. W. 680. The devisee of lands which the testator had contracted to purchase, and which he directed his executors to pay for, was in Headley *v.* Readhead, Coop. 50, treated as a pecuniary legatee in respect of the purchase money, and, therefore, the estate not being sufficient to pay the legacies and complete the contract, the legatees and devisee were held to contribute ratably. [And see Herne *v.* Meyrick, 2 Salk. 416, 1 P. W. 201; Collins *v.* Lewis, L. R., 8 Eq. 708; Dugdale *v.* Dugdale, L. R., 14 Eq. 234; Tomkins *v.* Colthurst, 1 Ch. D. 626; Farquharson *v.* Floyer, 3 Ch. D. 109. Residuary devisees are not liable to contribute; the decision of Lord Chelmsford that they are so liable is a mere mistake.]

6. [Specific legacies (*s*) and real estate devised, whether *in terms specific or residuary, (*t*) are liable to contribute *pro rata*.] (*u*)

(*s*) As to what legacies are pecuniary or general, and what specific, see 1 P. W. 539; 2 P. W. 328; Amb. 566, (but see 2 B. C. C. 111); 2 B. C. C. 18; 2 Ves., Jr., 639; 4 Ves. 150, 555, 568; 5 Ves. 199, 461; 11 Ves. 607; 15 Ves. 384; 1 Mer. 178; 5 Sim. 530; [1 De G. & Jo. 438; L. R., 20 Eq. 312; 6 Ch. D. 603; 7 Ch. D. 339.

(*t*) Hensman *v.* Fryer, L. R., 3 Ch. 420; Lancefield *v.* Iggulden, L. R., 10 Ch. 136.] **Every devise specific under old law.**—Under the old law every devise, however general in terms, was virtually specific, Forrester *v.* Lord Leigh, Amb. 173; Scott *v.* Scott, 1 Ed. 459; Keeling *v.* Brown, 5 Ves. 359; Milnes *v.* Slater, 8 Id. 303, overruling Gower *v.* Mead, Pre. Ch. 3. And see particularly Mirehouse *v.* Scaife, 2 My. & Cr. 695, where Lord Cottenham took a general view of the authorities for the proposition that pecuniary legatees are not entitled to have the assets marshaled as against a residuary devisee of lands, the principle applicable to specific and residuary devises being identical. The ground for this doctrine was, that as the testator could dispose only of the lands actually belonging to him when he made his will, any devise therein, however general in terms, amounted in reality to nothing but a gift of the lands he then had. Thus, if a testator having lands called Blackacre and Whiteacre, before the year 1838, devised Blackacre to A and the residue of his real estate to B, the devise to B, though residuary in expression, was in point of fact a mere devise of Whiteacre, and was so regarded for all purposes. Therefore, if in such a case the testator owed specialty debts, which were to be satisfied out of his real estate, Whiteacre, the property of B, was not first applicable (as would be the case if the respective subjects of disposition were personal estate), but A and B stood upon an equal footing, both estates being applied *pro rata*.

The ground of the doctrine does not apply to wills which are subject to the new law, as a general or residuary devise is, by 1 Vict., c. 26, made to extend to all the real estate belonging to a testator at the time of his decease, thereby abolishing all distinction between real and personal estate in this particular: and analogy might seem to require the adoption of a uniform rule in regard to real and personal estate; [and it was so decided by Kindersley, V. C., who held that the order of liability was (1) real estate devised as residue, (2) pecuniary legacies, (3) real estate specifically devised, Henman *v.* Fryer, L. R., 2 Eq. 627, and cases there cited. Similar decisions, so far as concerned the two sorts of realty, were made by Romilly, M. R., Rotheram *v.* Rotheram, 26 Beav. 465; Bethell *v.* Green, 34 Beav. 202.] But the old rule had obtained so firm a footing that the struggle [anticipated in the first edition of this work ensued. Stuart, V. C., held that the old rule depended on the essen-

(*u*) Long *v.* Short, 1 P. W. 403, 2 Vern. 756; Tombs *v.* Roch, 2 Coll. 490; Gervis *v.* Gervis, 14 Sim. 665 (where Sir L. Shadwell overruled his own previous decision in Cornewall *v.* Cornewall, 12 Sim. 298); Young *v.* Hassard, 1 Jo. & Lat. 472; Jackson *v.* Hamilton, 3 Jo. & Lat. 711; compare Bateman *v.* Hotchkin, 10 Beav. 426; and see Fielding *v.* Preston, 1 De G. & J. 438. Specialty and simple contract creditors being now on an equal footing, the specific legatee has, it would seem, as good a right to compel the devisees to contribute towards payment of the latter as (according to the cases here cited) he had with regard to the former.

7. [Real and personal property which the testator has power to appoint and which he has appointed by his will.] (x) 4

tially specific character of a devise of real estate, and that the act had made no difference, Pearmain v. Twiss, 2 Gif. 130; Clark v. Clark, 34 L. J., Ch. 477, and other cases; and this view was adopted by Lord Chelmsford, L. C., who reversed the decision of Kindersley, V. C., in Hensman v. Fryer, L. R., 3 Ch. 420. The point was again contested as between specific and residuary devisees in Lancefield v. Iggulden, L. R., 17 Eq. 556, 10 Ch. 136, where Bacon, V. C., held that specifically devised realty was not liable until residuary realty had proved insufficient; but this was reversed by Lord Cairns, L. C., and James, L. J., and it is now settled that the old rule remains unchanged. It is remarkable, however, that to arrive at this conclusion Lord Cairns inverted the account usually given of the rule, and said that the non-devisability of after-acquired real estate was the *result* of treating a residuary devise as specific.

(x) Fleming v. Buchanan, 3 D., M. & G. 976; Hawthorn v. Shedden, 3 Sm. & Gif. 305. See also Troughton v. Troughton, 3 Atk. 660, 661; Bainton v. Ward, 2 Atk. 172, n., by Sanders.]

4. Property is liable for the payment of debts in the following order: *First*, personal property not exonerated expressly or by necessary implication; *second*, real property devised for the payment of debts; *third*, real property descended; *fourth*, lands specifically devised, Alexander v. Waller, 6 Bush 330; McCampbell v. McCampbell, 5 Litt. 97; Hays v. Jackson, 6 Mass. 153; Walker's Estate, 3 Rawle 241; Hall v. Hall, 2 McCord Ch. 269; Mitchell v. Mitchell, 21 Md. 244; Chase v. Lockerman, 11 Gill & J. 185; Estate of Woodworth, 31 Cal. 595; Elliott v. Carter, 9 Gratt. 541, 549. See also, to same effect, Heerman v. Robertson, 64 N. Y. 332; Commonwealth v. Shelby, 13 Serg. & R. 348; Warley v. Warley, 1 Bailey Eq. 397; Pell v. Ball, Speers Eq. 518. But see Livingston v. Newkirk, 3 Johns. Ch. 312; Brant's Will, 40 Mo. 266; Pinckney v. Pinckney, 2 Rich. Eq. 218. But this rule seems to have been disregarded in Evans v. Duncan, 4 Watts 24.

"The personal estate is the first and primary fund for the payment of debts," Kent, Ch., in McKay v. Green, 3 Johns. Ch. 66; Gore v. Brazier, 3 Mass. 523; Hawley v. James, 5 Paige 318; Livingston v. Newkirk, 3 Johns. Ch. 312; Schermerhorn v. Barheydt, 9 Paige 29; Bane v. Wick, 14 Ohio St. 505; Walker's Estate, 3 Rawle 241; Scott v. Morrison, 5 Ind. 551; Clarke v. Henshaw, 30 Id. 144; Newcomer v. Wallace, Id. 216; McCullom v. Chidester, 63 Ill. 477; Diversey v. Johnson, 93 Id. 547; Brant's Will, 40 Mo. 266; Mitchell v. Mitchell, 3 Md. Ch. Dec. 71; Chase v. Lockerman, 11 Gill & J. 185; Stevens v. Gregg, 10 Id. 143; Wyse v. Smith, 4 Id. 295; Hoye v. Brewer, 3 Id. 153; Post v. Mackall, 3 Bland Ch. 486, 518; Tessier v. Wyse, Id. 28; Henry v. Graham, 9 Rich. Eq. 100; Hull v. Hull, 3 Id. 65; Estate of Woodworth, 31 Cal. 595; Dunlap v. Dunlap, 4 Desaus. 305, 329; Haleyburton v. Kershaw, 3 Id. 105, 115; Johnson v. Farrell, 64 N. C. 266; Quinby v. Frost, 61 Me. 77; Elliott v. Carter, 9 Gratt. 541, 549; Estate of Wisner, 20 Mich. 442, 451; Magruder v. Carroll, 4 Md. 335; Whitehead v. Gibbons, 2 Stockt. 230; Keene v. Munn, 1 C. E. Gr. (N. J.) 398; Thomas v. Thomas, 2 Id. 356; Slack v. Emery, 3 Stew. (N. J.) 458; Biddle v. Carraway, 6 Jones Eq. 95; Shaw v. McBride, 3 Id. 173; Elliott v. Posten, 4 Id. 433; Drinkwater v. Drinkwater, 4 Mass. 354; Dean v. Dean, 3 Id. 258; Simmons v. Drury, 2 Gill & J. 32; Cornish v. Willson, 6 Gill 299, 316; Richardson v. Inglesby, 13 Rich. Eq. 59; Clinefelter v. Ayres, 16 Ill.

In fixing these several gradations of liability, the great struggle for a long period was to determine whether the descended assets *were applicable before or after devised lands which the testator had simply charged with (not particularly

Point as to descended assets.

329; Hewes v. Dehon, 3 Gray 205; Ruston v. Ruston, 2 Yeates 54, 60; Laurens v. Read, 14 Rich. Eq. 245. And that notwithstanding a general charge on the real estate or a power given to the executor to sell the real estate for debts, Miller v. Harwell, 3 Murph. 194; Mitchell v. Mitchell, *ubi supra;* Stevens v. Gregg, *ubi supra.* And in that case the real estate is only an auxiliary fund after the personalty is exhausted, Mitchell v. Mitchell, *ubi supra;* Stevens v. Gregg, *ubi supra;* Biddle v. Carraway, *ubi supra;* Cornish v. Willson, *ubi supra.*

"The general maxim, however, that the personalty is, as it is sometimes called, the primary, and at others the natural fund for the payment of debts, has been much pressed; and many cases cited in support of it. Not one of them is denied; but they are misapplied. They relate to the case of land devised, *charged in the will* with the payment of debts. If indeed lands be devised *to be sold* for the express purpose of paying debts, * * * and the surplus given away as money, there can be no doubt they are first liable, even as between them and a residuary legatee, unless some express interest is given to another in the land fund. For the residue is not given there in its general sense, after payment of debts; but it means the residue of the personal property after taking out such parts as are before given away. But where lands are merely *charged*, a question arises, are they to pay before or after the personalty? And the general rule is, that unless the contrary clearly—formerly, expressly—appear, the personal estate is to be first exhausted, and the real is only auxiliary; the charge being considered as an act of honesty in the testator, to have his debts of all sorts certainly and speedily paid; and not to charge the fund in the first instance, to which resort is to be had. The law fixes the burden on the personalty, and that can only be altered by the testator. And the intention on his part to alter it is not inferred upon slight grounds. Charging the land is not sufficient. However anxiously it is done, that will not, of itself, have the effect of exempting the personalty, says Lord Rosslyn, in the case cited of Faitt v. Northwicke, and Lord Thurlow says, in Samwell v. Wake, (1 Bro. C. 144,) and at several other times, that the testator must not only charge the real estate, but must show his purpose that the personal *should not* be applied, before the latter will be exempted. Many minute criticisms on wills have been made, to ascertain the intention in this respect. The final result of the discussions has been, that unless the personalty, although specifically bequeathed, be expressly or clearly exonerated by other parts of the will, a charge upon the lands will not have that effect. The reason is, that after one fund becomes fixed with the debts, or a particular debt, that fund can be relieved only by plain words postponing its liability, and substituting another fund in its place. A *general* charge will not do; because that may *as well* be considered the creation of an additional fund, in aid of that already liable, as the provision of a sole fund for the payment of debts. But it is entirely different where the personalty is specifically bequeathed, and the lands *descend.* So essentially different are the cases, that I should not have felt bound to notice at large those cases of a *charge*, but for the purpose of exhibiting clearly their leading principle, which, in another point of view, has an important application to this case, adverse to the defendant.

selected and appropriated for the payment of) his debts (*i. e.*, between the third and fourth classes in the preceding series,) and the question was finally settled in favor of the prior liability of the heir (though with disapprobation of the rule,) by Lord Thurlow in Donne *v.*

"That principle is, that the order of liability once existing between two funds can be changed only by the intention of the testator; and to show such intent, express or plain words are indispensable, so as to make the intent manifest," Ruffin, J., in Robards *v.* Wortham, 2 Dev. Eq. 173, 177.

And if the personal property, at first sufficient, is afterwards squandered by suffrance of the creditor, he cannot look to the land, Goodhue *v.* Barnwell, Rice (S. C.) 240. And, in Maryland, if personal assets are wasted, the remedy of the creditor is on the official bond of the executor or administrator, Wyse *v.* Smith, 4 Gill & J. 295.

And if the obligor, in a bond, binds himself and his heirs, the land descended is liable in the hands of the heir. But if there be personalty, and the heir pays the debt, he has the right to be reimbursed from such personalty, Tessier *v.* Wyse, 3 Bland Ch. 28.

And it seems that real estate descended must be applied in payment of debts in exoneration of personal estate bequeathed and not charged with debts, Verdier *v.* Verdier, 12 Rich. Eq. 138.

And the personalty is first liable even though the debt be on a building contract secured by lien under mechanics' lien laws, Taylor *v.* Taylor, 3 Bradf. 54.

In Hull *v.* Hull, 3 Rich. Eq. 65, in reversing a decree which held that the value of both devises and bequests should contribute ratably to the payment of debts, without regard to the distinction between real and personal property, it was said, at page 90, by Johnston, Ch.:

"If we look to the origin and history of administration, or to the apparatus by which it always has been, and now is, accomplished, or to the respective qualities of real and personal property, we shall be led to conclusions very different from those proposed for our adoption. If we look to precedents, and to the opinions of our own courts, and the action of our own legislature, we shall perceive what surprise and revulsion of property interests, and what inconvenience in the administration of estates, the adoption of that proposition would occasion.

"Administration was originally confined to personal property, and the course and subjects of it have never been altered, except by statute. It was performed by the Ordinary, originally, at his discretion; then according to a course prescribed; afterwards by deputies appointed by him. The duties of these administrators, except when named by a testator, were secured by bond, according to the value of the personalty.

"To accomplish the purposes of administration, the personalty vests in the personal representative, as its legal owner. Why? To give him that control necessary to the perfect administration of it. Only an equitable interest falls to the distributee or legatee, to be enforced after the payment of debts.

"This is the quality of personalty. Is it the quality of real estate? No. That descends to the heir. The title does not vest in the personal representative; nor has he any control of such property, except what may result from the provisions of the will. If it is devised, unless devised to the executor, or power is given him to dispose of it, he has no power to interfere with it, and the devisee takes it without his assent.

"This distinction, in the qualities of the two species of property, forms one

Lewis, (y) and by Lord Alvanley in Manning v. Spooner. (z) And in Harmood v. Oglander (a) Lord Eldon recognizes the distinction between a mere charge of debts and a devise directing the mode in which the debts are to be paid, which he characterizes as "thin," but considers

reason of the relative liability for debts. The executor has the control of the one and not of the other.

"Are there no other reasons why land should be more favored than chattels?

"May it not be for the interest of infant or female devisees, to have their portions in that species of property, which is more permanent in its character, less subject to be eloigned, or devastated, upon which the marital right of the husband of a female heir would not so fully attach, and which cannot be alienated without her express consent after attaining majority?

"May it not be for the benefit of estates, that the debts be paid primarily out of that species of property which is more perishable, and more subject to be eloinged or devastated; and which, as we all know, and as the decree states, is more salable, and is less liable to be sacrificed?"

The real property of a decedent is liable for debts as a secondary fund, Clinefelter v. Ayres, 16 Ill. 329; Bishop v. O'Conner, 69 Id. 431. And where debts are by the will charged upon realty, this will not make it otherwise, unless the intention to change the legal order be very clear, Clinefelter v. Ayres, *ubi supra*.

But real estate devised is not liable for the payment of debts until after the whole personal estate, including legacies, shall have been exhausted, Dugan v. Hollins, 11 Md. 41; Lanier v. Griffin, 11 S. C. (1 Shand) 565; or shown to be insufficient, Diversey v. Johnson, 93 Ill. 547.

It ought to appear regularly on the face of the pleadings that the whole of the personalty has been applied towards the extinguishment of debts and legacies, before a court of equity could, consistently with established principles decree, the land to be liable for that purpose, Hoye v. Brewer, 3 Gill & J. 153, 157. And the admissions of the solicitors of the defendants, incorporated into the decree of the county court, that all the personal assets had been so expended, will not, on the principle that a party must obtain redress *secundum allegata et probata*, cure such defect, Id.

In applying personal property to the payment of debts, that which is not specifically bequeathed, inclusive of the general residue, is first liable, Whitehead v. Gibbons, 2 Stockt. 230; Nash v. Smallwood, 6 Md. 394; a residuary legacy is not reckoned specific in such case, Whitehead v. Gibbons, *ubi supra*. And legacies payable out of the proceeds of land directed to be sold for the purpose are to be regarded as specific in such marshaling, Cryder's Appeal, 11 Penna. St. 72.

In Scott v. Morrison, 5 Ind. 551, 552, Perkins, J., says: "The personal estate constitutes the primary fund for the payment of debts. The testator may, however, exonerate it, and charge the debts upon the realty. But he will not be taken to have done so without a clear expression, to be gathered from the whole will, to that effect. On this point the law is well settled both in England and in the United States. What constitutes such an expression is the difficult question now arising in this class of cases. It was, in the earlier stages of the law, held that it must be by an express declaration. This rule is now modified, but still the intention to exonerate the personal property must be manifest."

(y) 2 B. C. C. 257.
(z) 3 Ves. 114.
(a) 8 Ves. 125.

as too firmly established by authority to be disturbed. A devise to the heir, though inoperative according to the old law (*b*) to break the descent, was held to demonstrate an intention to place, and to have the

But if the personal estate specifically bequeathed be taken for the payment of debts, the whole must be taken *pro rata*, for there can be no distinction between that which is directly and absolutely given, and that which is bequeathed to one for life with remainder in fee to another, Laurens *v.* McGrath, 1 Rich. Eq. 296, 300.

Where debts are not charged on the land, personal property specifically bequeathed is liable for debts before the land, McCampbell *v.* McCampbell, 5 Litt. 97; Dean *v.* Dean, 3 Mass. 258; Drinkwater *v.* Drinkwater, 4 Id. 358; Ferguson *v.* Broome, 1 Bradf. 10; Skidmore *v.* Romaine, 2 Id. 122; Lloyd *v.* Lloyd, 10 Rich. Eq. 469; Foster *v.* Crenshaw, 3 Munf. 514; but not before lands devised by residuary devise, McMullin *v.* Brown, 2 Hill Ch. (S. C.) 463; even though the specific bequest be charged with the debts, the residue not being exonerated, Harrison *v.* Haskins, 2 Patt. & H. (Va.) 388; nor before lands descended or appropriated by the testator for payment of debts, Walker's Estate, 3 Rawle 241; Robards *v.* Wortham, 2 Dev. Eq. 173; Commonwealth *v.* Shelby, 13 Serg. & R. 348; Alexander *v.* Worthington, 5 Md. 471; Brown *v.* James, 3 Strobh. Eq. 24; Warley *v.* Warley, 1 Bailey Eq. 397; Lightfoot *v.* Lightfoot, 27 Ala. 351; Trumbo *v.* Sorrency, 3 Mon. 285; Spraker *v.* Van Alstyne, 18 Wend. 200, reversing 13 Id. 582. But see, *contra*, Broadwell *v.* Broadwell, 4 Metc. (Ky.) 290. But it was said, in Estate of Woodworth, 31 Cal. 595, that the making of a specific bequest is regarded as indicating an intention to discharge the particular personal property specifically bequeathed from the debts of the testator.

But see Shreve *v.* Shreve, 2 Stockt. 391, to the effect that "where the testator makes his debts a charge upon his real as well as personal estate or upon his estate generally the devisees and legatees must bear their respective share of the burthen *pro rata*," and the Court of Errors and Appeals of New Jersey, while reversing the case on other points, and holding that there was no express charge of debts, held that "a specialty debt, *proprio vigore*, is a burden upon lands devised to the same extent as it is upon a specific legacy," S. C., 2 C. E. Gr. (N. J.) 487, 495; see also Thomas *v.* Thomas, Id. 358.

A direction to convert real estate for the payment of debts and legacies is not to be executed if the personal property not specifically bequeathed is already sufficient, McCarty *v.* Terry, 7 Lans. 237.

Where there is a direction to the executor to pay debts, and there are both specific and residuary devises of land, and also after-acquired land descended, if it becomes necessary to sell the land for the payment of debts, the order of liability will be—*first*, the residuary devise; *second*, the lands descended; *third*, the land specifically devised, Hays *v.* Jackson, 6 Mass. 149. So lands descended are liable before lands charged with the debts and specifically devised, Adams *v.* Bracket, 5 Metc. 280; Lee, Appellant, 18 Pick. 288; Hall *v.* Hall, 2 McCord Ch. 269; Stires *v.* Stires, 1 Halst. Ch. 224.

Descended lands are liable before lands devised, and cannot call on the latter for contribution in payment of debts, but devised lands must contribute among themselves for the relief of one another, Livingston *v.* Livingston, 3 Johns. Ch. 152; Livingston *v.* Newkirk, Id. 312.

Where descended and devised lands are

(*b*) But now see stat. 3 and 4 Will. IV., c. 106, § 3; *ante* vol. I., p. *74.

effect of placing, the heir on an equal footing with the devisees, properly so called, in this respect. (c)

Land descending subject to charge or trust to pay.

[The order in which the descended estates are liable is not generally varied in favor of the heir by their being included with the devised estates in the charge of debts, (d) nor by the circumstance that they come to the heir by lapse and not as simply undisposed of, (e) nor by both of these circumstances together. (f) And where the real estate is expressly devised to pay debts, and subject thereto part is devised beneficially and part not, the order is not varied against the heir so as to charge the descended part before the devised part, but both parts are liable *pari passu*. (g)

As to lapsed undivided share.

But if, subject to a previous trust to pay, or charge of, debts (for here the form of charge is immaterial) the real and personal estate is given to several as tenants in common, and one share lapses; the lapsed share is liable *pari passu* with the shares effectually devised. Thus in Fisher *v.* Fisher, (h) where a testator devised his freehold estates amongst his seven children, and empowered his executors, notwithstanding the preceding devises, to sell

sold for the payment of debts, and personal property afterwards comes to the hands of the executor, it forms a fund representing in the first instance the devised lands which have been sold, and the devisee of such lands is entitled to subrogation, Graham *v.* Dickinson, 3 Barb. Ch. 169.

Where a will directed certain real estate to be sold for the support and education of the children of the testator, and such real estate was not sold, but a part of the personalty which ought to have been appropriated to the payment of debts was used for that purpose—*quære*, whether creditors might call upon a court of equity to sell such real estate for the payment of their claims, Wyse *v.* Smith, 4 Gill & J. 295.

The administrator cannot sell real estate for the payment of debts unless the personalty be insufficient for that purpose, Newcomer *v.* Wallace, 30 Ind. 216. Nor can an executor sell a specific legacy unless the debts of the testator require it, Saxon *v.* Barksdale, 4 Desaus. 522.

"In administration cases, the general principle of marshaling which saves the whole or a part of the realty from the burden of the testator's debts is not founded in any preference of one portion of the real estate over another, but proceeds upon the idea that the personal estate is the primary fund for the payment of those debts for which the testator was personally liable unless, by express words, or otherwise, a different intent is plainly apparent," Graves, J., in Estate of Wisner, 20 Mich. 442, 451.

(c) Biederman *v.* Seymour, 3 Beav. 368. [And since 3 and 4 Will. IV., c. 106, see Strickland *v.* Strickland, 10 Sim. 374.

(d) Williams *v.* Chitty, 3 Ves. 545; Barber *v.* Wood, 4 Ch. D. 885.

(e) Williams *v.* Chitty, *sup.*; per Kindersley, V. C., Dady *v.* Hartridge, 1 Dr. & Sm. 241.

(f) Williams *v.* Chitty, *sup.*

(g) Stead *v.* Hardaker, L. R., 15 Eq. 175.

(h) 2 Kee. 610.

so much of the freehold estates as should be necessary for payment of his debts, funeral and testamentary expenses, and directed the money so raised to be applied in payment of such debts, &c., accordingly, and that the surplus *money should go according to the preceding devise of the freehold estates. The testator then gave his leaseholds amongst his seven children, and bequeathed his personal estate (except leaseholds) to his daughter E., exonerated from his debts, &c., and charged his freeholds as the primary fund, and his leaseholds as the second fund, for payment of his debts, &c. One share of the freeholds and leaseholds lapsed by the death of a child; and it was held by Lord Langdale that the testator had appropriated first his freeholds, and secondly his leaseholds, as the special fund for the payment of his debts, that the interest which the deceased child would have taken if he had lived was a share of so much only as remained after deducting debts, and therefore that his share of so much only lapsed. In other words, the lapsed share was liable *pari passu* with the shares well devised.

In what order lapsed interests descending to the heir contribute.

So, in Wood *v.* Ordish, (*i*) where a testator by will dated in 1832 devised all his real and personal estate subject to the payment of his debts to one for life, with remainder to three persons as tenants in common, and afterwards purchased other lands which were of course unaffected by the will: one of the shares in remainder lapsed, and it was held by Sir J. Stuart, V. C., that the simply descended lands must first be exhausted, and that the lapsed share of the devised estate was then applicable for payment of debts *pari passu* with the other shares; observing that if the descended estates were sufficient the life estate and the remainder in the entirety, including the lapsed share, would be freed; but that if the descended estates were not sufficient, then a part of the devised estates must be taken before any enjoyment could be had of the life estate, because the charge was upon the entirety of the fee simple. For the same reason none of the rights in remainder, whether by lapse or by the devise, could accrue till the charge of debts was provided for; the share of the heir was thus, as to the liability to the charge, on the same footing as the other shares.

These two cases were treated by Sir W. P. Wood without any distinction as laying down the principle that as between the heir-at-law, the next of kin and the residuary devisees and legatees, a lapsed *share*

(*i*) 3 Sm. & Gif. 125.

of real and personal estate ought to be applied in the same order as if the legatee had survived; and they were followed by him accordingly.] (*k*)

Principle of contribution, when applied.

*Where several distinct properties, subject to a common charge, are disposed of among several persons, recourse is had, by an obvious rule of justice, to the principle of contribution.[5] Thus, if the testator, after subjecting his real estate to the

(*k*) Peacock *v.* Peacock, 34 L. J., Ch. 315. See also Ryves *v.* Ryves, L. R., 11 Eq. 539. The rule had long before been established with regard to residue of personal estate, see Eyre *v.* Marsden, 4 My. & C. 231; Trethewy *v.* Helyar, 4 Ch. D. 53. It does not appear what, if any, weight was attributed to the personalty being given with the realty in laying down the rule as to the realty.]

5. Legacies contribute ratably to the payment of debts, so far as they are not specific, Colbert *v.* Daniel, 32 Ala. 314. So, too, among themselves, specific and demonstrative legacies, Hallowell's Estate, 23 Penna. St. 223; Dugan *v.* Hollins, 11 Md. 41; Everitt *v.* Lane, 2 Ired. Eq. 548. But the residuary legacy must be exhausted before a pecuniary (demonstrative) legacy can be called upon to contribute, Wilcox *v.* Wilcox, 13 Allen 252. And other legacies cannot call for contribution upon a legacy in lieu of dower, the widow being considered a purchaser in such case, Lord *v.* Lord, 23 Conn. 327; Hubbard *v.* Hubbard, 6 Metc. 50; Williamson *v.* Williamson, 6 Paige 305; McGlaughlin *v.* McGlaughlin, 24 Penna. St. 22; Stuart *v.* Carson, 1 Desaus. 500; unless so expressed by the will, Orton *v.* Orton, 3 Abb. App. Dec. 411.

Specific legacies are exempt from contributing to the debts of testator, more especially where they are given in lieu of other claims which the legatee had against the testator, Stuart *v.* Carson, *ubi supra;* White *v.* Green, 1 Ired. Eq. 45. But see Snow *v.* Callum, 1 Desaus. 542.

But where there is no other personal estate than the specific legacies, they must be intended to be subject to the pecuniary legacies, and they must abate *pro rata*, White *v.* Beattie, 1 Dev. Eq. 87; White *v.* Green, *ubi supra;* Biddle *v.* Carraway, 6 Jones Eq. 95. In regard to this rule, and the exception thereto, it was said in White *v.* Green, 1 Ired. Eq. 45, 53, by Ruffin, C. J.: "That, we know, is the general rule—but there is an exception to it, within which we think this case falls. If a general legacy be expressly charged upon a specific legacy, then, of course, it is payable thereout. So, if a pecuniary legacy be given, and there be no fund to pay it, or rather, if there never was any fund to pay it, except the specific legacies, owing to the fact that everything is given away specifically, the necessary construction is, that the general legacy is to be raised out of the personal estate, although specifically bequeathed. For it is not to be supposed the testator meant to mock the legatee."

Mr. Roper says: "A case may happen in which specific legatees will be obliged to share in favor of pecuniary legatees. Suppose then, a person possessing a personal estate at B and C only, bequeath it specifically to D and E, and then gives a legacy to F generally; the personal estate at B and C will be liable to the payment of this legacy, as there never was any other fund out of which F's legacy could have been satisfied," 1 Rop. on Leg. 418.

Where a legacy has been voluntarily paid by the executor to the legatee, the assets afterwards proving insufficient, the legatee's duty of contribution may be en-

payment of his debts or legacies, devise Blackacre to A and Whiteacre, (*l*) [or the residue of his real estate,] (*m*) to B, and these estates in the administration of the assets become applicable, the charge will be thrown upon the devisees in proportion to the value of their

forced against him by way of set-off to a debt for which he has brought action against the executor, Harris *v.* White, 2 South. 422.

Real estate devised is not liable to contribute to the payment of legacies, on a deficiency of personal assets, unless specially charged, Hayes *v.* Seaver, 7 Greenl. 237; Elliott *v.* Carter, 9 Gratt. 541, 550. Nor where a specific legacy is taken to pay a *simple contract* debt, Dugan *v.* Hollins, 11 Md. 41.

But if specific legacies, bequeathed by the will of the testator, have been applied to the payment of specialty debts, the specific legatees are entitled to contribution against the devisees of the real estate, Chase *v.* Lockerman, 11 Gill & J. 185, 204. But, so far as such legacies may have been applied to the extinguishment of the claims of simple contract creditors, no such right of contribution exists as against devisees of the realty, as the personal fund alone is responsible for the payment of debts of this description, Id.

The residue is first to be exhausted before other legacies can be called on to contribute, McGlaughlin *v.* McGlaughlin, 24 Penna. St. 22; Murdoch's Appeal, 31 Id. 47.

And where there is a devise of land to A, encumbered by ground rents, and other devises to executors to apply rents to payment of annuities, taxes, ground rents and debts, and to sell one parcel two years after widow's death, the savings from rents, and the accruing rents to be applied to extinguish the ground rents, and the proceeds of sale, *with the residue,* to the payment of certain legacies, these legacies become residuary, and abate before the bequest for extinguishment of ground rents, Murdoch's Appeal, *ubi supra.*

One fund cannot be subjected to the relief of another, upon the principle of substitution, unless it be made to appear clearly that the former fund was liable to the debt which the latter has discharged, Greenlee *v.* McDowell, 3 Jones Eq. 325.

Where a legacy is charged on land, and the land subsequently divided, each part has the right of contribution against the others, Van Winkle *v.* Van Houten, 2 Gr. Ch. (N. J.) 172.

Where an executor, who is both a devisee and a residuary legatee, is directed by the testator to pay his debts, he has no right of contribution against other devisees or legatees, Flanders *v.* George, 55 N. H. 486. Nor where an executor has paid a debt, having departed from the directions of the will, can he call upon the real estate to reimburse him, after the personalty, which was originally sufficient to pay debts, has been lost, Feemster *v.* Good, 12 S. C. (2 Shand) 573.

Where personal property has been given away by a testator in his lifetime, and does not need the aid of his will to pass the title to it, it will not abate for the payment of debts where there is a deficiency of assets, although the gift be confirmed by the testator in his will, Biddle *v.* Carraway, 6 Jones Eq. 95.

Where two pieces of land are separately devised, one to be sold and the proceeds to be divided between testator's daughters, "after deducting" $300 for three legacies

(*l*) See Heveningham *v.* Heveningham, 2 Vern. 355, 1 Eq. Cas. Ab. 117; Growcock *v.* Smith, 2 Cox 397; Carter *v.* Barnardiston, 1 P. W. 504; [Johnson *v.* Child, 4 Hare 87.] See also 3 P. W. 98.

[(*m*) Gibbins *v.* Eyden, L. R., 7 Eq. 371.]

respective portions of the property. And, by parity of reason, where several estates, subject to a common charge, devolve by descent upon different persons (which happens where they descended to the last owner from opposite lines of ancestry, and his own paternal and maternal heirs are different persons, or they are held by several tenures, involving different courses of descent,) the same principle of contribution obtains. (*n*)

Immaterial that part of the property

And the rule is the same where the property charged is partly real and partly personal. Thus, if a testator, after commencing his will with a general direction that his debts shall be

to grandchildren, and there is no personal property, both pieces of land are equally liable for the payment of debts, and must contribute to restore the $300 fund misappropriated for the debts to the exclusion of the demonstrative legacies to the grandchildren, Barklay's Estate, (also cited as Loomis' Appeal,) 10 Penna. St. 387. In this case it was said by Rogers, J., at page 390: "Where the estate is neither charged with debts or legacies, nor subject to a specific lien, and it does not descend, but is devised to a stranger, or the heir, a Chancellor refuses to marshal the assets in favor of a general legatee, because there is no reason to think he was as near to the testator's heart as was the specific devisee." But where one farm is to be sold at once for the payment of certain legacies, and the other farm is to be sold, but no time specified, and the proceeds of it are only to be applied to the legacies if the first fund is insufficient, the latter farm is liable for debts before the other, and even before surplus proceeds of the other, after payment of the legacies, Cryder's Appeal, 11 Penna. St. 72.

Legacies that have been paid in full are not liable to contribute to other legacies lost by the executor's default, where the personal property originally in his hands was sufficient for all, Sims *v.* Sims, 2 Stockt. 161; Lupton *v.* Lupton, 2 Johns. Ch. 614. But the rule is otherwise as to contribution for payment of debts, made necessary by waste of assets on the executor's part, Stuart *v.* Kissam, 2 Barb. 493; Lupton *v.* Lupton, *ubi supra.*

If a testator dies leaving both personal and real estate, and owing debts secured by mortgage on the realty, and bequeaths all the personalty and one-half the realty to one person, and the other half of the realty to another, and makes no mention of his debts, the legacies and devises are all general, and under Sections 180 and 181 of the probate act of California, the real and personal estate devised must contribute *pro rata* to the payment of the debts in proportion to the value or amount of the several devises or legacies, Estate of Woodworth, 31 Cal. 595.

Under the N. Y. Revised Statutes, legatees and devisees are only required to contribute *pro rata* to the payment of debts, irrespective of the insolvency of other legatees or devisees and their consequent failure to contribute, and if they pay the share of such others they can only be subrogated to the rights of the creditors against such others by taking an assignment of the claim, Wilkes *v.* Harper, 2 Barb. Ch. 338. See, too, Schermerhorn *v.* Barheydt, 9 Paige 43.

(*n*) See Lord Eldon's judgment in Aldrich *v.* Cooper, 8 Ves. 390. See this case [and Leonino *v.* Leonino, 10 Ch. D. 460] as to the question whether a mortgage equally affects both subjects comprised in it, or the one was to be *first* applied.

paid, proceeds to dispose specifically of his real and personal estate among different persons; as the charge would, we have seen, affect the whole property so given, real as well as personal, the devisees and legatees will bear their respective shares of the burden *pro rata*. (o)

charged is real and part personal.

It should seem then, that, although personalty not expressly charged with debts is applicable before real estate not so charged, yet when both species of property are expressly onerated [and the personalty is specifically bequeathed,] no distinction of this nature is admitted, but the whole stands on an equal footing. 6

In precise accordance with this principle, too, where a testator creates out of real and personal estate a mixed fund to answer certain charges, he is considered as intending, not that the personalty shall be the primary and the realty the auxiliary fund for those charges, but that each shall contribute ratably to the common burden. And it is immaterial that the combined fund comprises the whole of the testator's real and personal estate.

Effect where real and personal estate constitute a mixed fund to answer charges.

*Thus, in Roberts *v.* Walker, (p) where a testatrix gave to trustees certain freehold, copyhold and leasehold estates and shares in certain companies, and all other real and personal estate, upon trust to sell and convert the same, and as to the moneys arising therefrom, and the rents and profits in

Real and personal estate made a mixed fund to answer certain charges.

(o) Irvin *v.* Ironmonger, 2 R. & My. 531.

6. Where real and personal property are blended, debts and legacies are thereby made a charge upon the land, the land being liable after the personalty is exhausted, Hassanclever *v.* Tooker, 2 Binn. 525; Witman *v.* Norton, 6 Id. 396; Gallagher's Appeal, 48 Penna. St. 121; Monroe's Estate, 9 Phila. 309; Commonwealth *v.* Shelby, 13 Serg. & R. 348. But in Bank *v.* Donaldson, 7 Watts & S. 407, it was held that legatees would not be obliged to look to the personal estate first in favor of creditors of the donee of the whole blended fund. See also Ford *v.* Gaithur, 2 Rich. Eq. 270.

But in Robinson *v.* McIver, 63 N. C. 645, 649, it was said by Pearson, C. J.: "When, in a residuary clause, land and personalty are made a mixed fund, the land as well as the personalty is made subject to the payment of pecuniary legacies. This, however, is not on the footing of a *charge on land*, like the annuities in this case, but on the ground that in order to ascertain what is embraced in the residuary fund, it is necessary to take out the specific legacies, and then to deduct the pecuniary legacies, and only what remains is 'the rest and residue of the estate.' The residuary legatee takes only *what is left*."

(p) 1 R. & My. 752; see also Dunk *v.* Fenner, 2 R. & My. 557; [Fourdrin *v.* Gowdey, 3 My. & K. 383; West *v.* Cole, 4 Y. & C. 460; Cradock *v.* Owen, 2 Sm. & Gif. 241; Young *v.* Hassard, 1 Jo. &

the meantime, upon trust in the first place to pay all her debts, funeral and testamentary expenses, and in the next place to pay certain legacies with interest and the duty thereon, and to apply the residue in such manner as the testatrix by any codicil should direct. The testatrix died without making any codicil. The question being, whether the debts and legacies were to be paid out of the personalty so far as it would go, in exoneration of the real estate and for the benefit of the heir, or whether they were to be borne by the real and personal estate proportionally, Sir J. Leach, M. R., decided in favor of the latter construction, observing, "When a testator creates from real estate and personal estate a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, he does, in effect, direct that the real and personal estate which have been converted into that fund shall answer the stated purposes and every of them *pro rata*, according to their respective values. If any of those purposes fail, then the part of the fund which, according to the intention of the testator, would otherwise have been applicable to those purposes, is undisposed of. As far as this part of the fund has been composed of real estate, the heir is to have the benefit of it as so much real estate undisposed of; and as far as this part of the fund has been composed of personal estate, I am of opinion that it is personal estate undisposed of for the benefit of the next of kin; and in order to ascertain the proportions which will thus belong to the heir and next of kin respectively, it must be referred to the master to compute the respective values of the real and personal estate, which are thus blended by the testator into one common fund."

Charges thrown on real and personal estate as a mixed fund.

So, in Stocker *v.* Harbin, (*q*) where a testator gave all his real and personal estate to A, B and C, upon trust to sell all his real estate and convert into money his personal estate; and he directed his trustees to stand possessed of the moneys to arise by *virtue of his will, in trust to pay all his just debts and funeral and testamentary expenses, and then to appropriate and take out of his said *trust moneys* the sum of £1000, and invest the same in manner therein mentioned for the benefit of his son D, which sum, in a certain contingency, was to revert to and become part of his *residuary moneys and estate;* and the testator then pro-

Lat. 466; Robinson *v.* London Hospital, 10 Hare 19; Simmons *v.* Rose, 6 D., M. & G. 411; Bedford *v.* Bedford, 35 Beav. 584.]

(*q*) 3 Beav. 479; [Shallcross *v.* Wright, 12 Beav. 505.

ceeded to give certain directions concerning his residuary moneys and estate. The testator by an unattested codicil revoked the legacy of £1000; and Lord Langdale, M. R., held that, as the codicil was inoperative in regard to the freehold estate, the legacy remained in force as to such proportion of it as was payable out of the produce of the freeholds, for the legacy, being given out of a mixed fund constituted of both real and personal estate, would have been payable out of both in proportion to their respective amounts. (r)

Again, in Salt v. Chattaway, (s) where a testator devised and bequeathed his real and personal estate in trust to sell, and out of the proceeds and out of the ready money he might die possessed of, to pay to J. £100, and to divide one-third of the residue of the moneys to arise as aforesaid among J. and five other persons; J. died in the testator's lifetime. It was held that the next of kin and the heir were entitled to their proportionate parts of the lapsed share of the residue, and that the legacy of £100 fell into the residue and passed by the gift thereof. (t) Lord Langdale observed that the two sorts of estate being blended, each contributing in proportion to fulfill the purposes which could be accomplished, the share of residue which had lapsed must be deemed to consist of proportionate parts of the two sorts of estate.

How a mixed fund is created.

[Whether this blending has been effected is a frequent question. As it concerns the partial exoneration of the personal estate from its regular burdens, it depends on principles presently to be discussed. (u) It may, however, be observed here that the mere fact that the real and personal estate are given together, upon trust out of the issues, dividends, interest and profits thereof to pay debts, legacies, or annuities, has been often held insufficient to exempt the personal estate from its primary *liability. (x) And it was said by Sir G. Turner, L. J., in Tench v. Cheese, (y) that "in order to effect that purpose there must be a direction for the sale of the real

(r) But if the gift out of the real estate had been of a *legal* rent-charge, a court of law would have given effect to the whole charge out of the real estate, Locke v. James, 11 M. & Wels. 912, where it is suggested that there might be a remedy in a court of equity, *sed qu.*]

(s) 3 Beav. 576. [See also Att.-Gen. v. Southgate, 12 Sim. 77, 83, 12 L. J., Ch. 147; Shallcross v. Wright, 12 Beav. 505.]

(t) As to this, *vide ante* vol. I., p. *642.

[(u) *Infra*, § 3.

(x) Boughton v. Boughton, 1 H. L. Cas. 406, reversing 1 Coll. 26; Blann v. Bell, 5 De G. & S. 665; Tidd v. Lister, 3 D., M. & G. 857; Bentley v. Oldfield, 19 Beav. 225; Tench v. Cheese, 6 D., M. & G. 453; Ellis v. Bartrum, 25 Beav. 110.

(y) 6 D., M. & G. 467.

estate,—so as to throw the two funds absolutely and inevitably together to answer the common purposes of the will."

But this *dictum* was criticised in Allan *v.* Gott, (*z*) where a testator directed his debts and funeral and testamentary expenses to be paid out of his personal estate; and, after various legacies (not in question) and a specific devise, he devised and bequeathed all other his real estate and all his moneys and securities and all other his personal estate to trustees on the trusts thereinafter declared; and he *empowered* his trustees in case and as often as they should think fit to sell, call in and convert into money all and every his said real and personal estate; and he directed that they should stand possessed of the residue of his said real and personal estate and of the moneys arising from the sale thereof or of any part thereof if and when sold upon trust, after payment of his debts, funeral and testamentary expenses and the legacies thereinbefore bequeathed, to invest the residue of the same trust moneys, and out of the interest, dividends and annual proceeds thereof to pay a life annuity to his wife in satisfaction of her claims on a certain settled sum, which she was to release to his trustees, and he directed them to apply that sum in augmentation and "as part of *the fund to arise from* the residue of his real and personal estate." He then directed his trustees, by and out of the said trust estates, moneys and premises, to raise six large legacies, and gave the residue of his said real and personal estate to A, his heirs, executors, administrators and assigns. A died before the testator. It was held by Sir W. James, L. J., that, as between the heir and next of kin, the annuity and the six legacies were charged on the real and personal estate *pro rata*. Referring to Sir G. Turner's *dictum*, he said it had been argued from it that Tench *v.* Cheese established as a rule of law that there must be conversion out and out, but that that was not really necessary for the decision of that case, and that the distinction between an absolute direction and a discretionary power to sell was not there before the court: that there must be other modes of ascertaining an intention to exonerate the personal estate besides an absolute direction *to sell, otherwise the rule would exclude a case in which a testator said expressly that he meant his real estate to be the primary fund. (*a*) Here the L. J. thought there was strong evidence of intention to create a mixed fund. The testator "has, in fact, put

Allan v. Gott.

(*z*) L. R., 7 Ch. 439.

(*a*) But of course Turner, L. J., was speaking only of cases where the intention was not express.

the whole property into the hands of the trustees as one mixed estate, with a full discretion in them to sell and apply if and as they think fit the whole of the realty *before* they touch a single portion of the personalty;" and "by way of evidencing" the mixed and special character of the fund he had created, he had directed that the settled money should be added to that which he had himself called *the fund to arise from* the residue of his real and personal estate.

It seems, too, that where pecuniary legacies are given, and afterwards "the residue of the real and personal estate," so that under the rule in Greville *v.* Browne, (*b*) the legacies are charged on the realty, the realty and personalty are liable *pari passu.* (*c*)

Payments directed out of aliquot shares of real and personal estate.

In Falkner *v.* Grace, (*d*) a testator gave his real and personal estate in trust to pay one moiety of the rents, dividends, &c., to A, and out of the other moiety to pay an annuity to B, and it was held by Sir G. Turner, V. C. ("distinguishing the case from Boughton *v.* Boughton,") that the annuity was payable *pro rata* out of the real and personal estates. The ground of this judgment is not reported: but as there are no burdens regularly incident to a *share* of personalty, there was here no *prima facie* liability to be negatived. Once divided into shares, the estate is assumed to be no longer assets, but the property of the devisees, subject to the burdens imposed by the will on their respective shares.

Implied exoneration of a legatee from order of administration directed.

The order in which a testator directs his estate to be administered may be such as impliedly to show that one of two devisees or legatees is to have priority over the other, though under the gift simply to them they would have contributed ratably to payment of debts. Thus, in Legh *v.* Legh (*e*) a testator devised his B. estate to certain uses, and he devised his M. estate to trustees upon trust to sell and raise portions for his younger children, *and from and after the complete performance and satis*faction of all and every the trusts, powers and authorities thereby given and declared and subject thereto in the first instance,* and also subject to the payment of debts and other legacies, he directed the trustees to stand possessed of the M. estate in trust for his eldest son absolutely. The M. estate was only sufficient to pay the portions and some of the debts, and it was contended that the portions and the B. estate ought to con-

(*b*) 7 H. L. Cas. 689, *ante* p. *605.

(*c*) See Gainsford *v.* Dunn, L. R., 17 Eq. 405; Wells *v.* Row, 48 L. J., Ch. 476.

(*d*) 9 Hare 281.

(*e*) 15 Sim. 125. See also Raikes *v.* Boulton, 29 Beav. 41; Earl of Portarlington *v.* Damer, 4 D., J. & S. 161.

tribute ratably towards remaining debts; but Sir L. Shadwell, V. C., held that the B. estate was alone liable in the first instance. That this was the true construction is evident from the fact that the testator directed the portions to be paid in priority to the debts, while he must be considered to have known that the law ranked the debts in priority to the devisees of the B. estate, which latter priority he had not disturbed; the order of priority contemplated by him therefore was—1, Portions; 2, Debts; 3, Devisees of the B. estate; and the property being insufficient for all three classes, the deficiency fell on the devisees in exoneration of the portions.

Apportionment of charge does not affect person entitled to charge.

The apportionment between the several species of property of the liability to a charge imposed on them by the testator operates only as between the respective devisees of the properties charged, and does not affect the person entitled to the charge; thus if real and personal property is blended and charged with a legacy, and by codicil, the real property is given freed from the charge, the personalty remains subject to the whole charge.] (*f*)

Legatee of an encumbered chattel entitled to claim exoneration.

II.—As to the general right of a devisee, [in cases not affected by the statute 17 and 18 Vict., c. 113, hereafter stated,] to be exonerated from an encumbrance to which the testator, either before or after the making of his will, has subjected the devised estate, there cannot, at this day, be any doubt or controversy. And it is clear that the legatee of any chattel, specifically bequeathed, has the same right.[7]

Arrears of rent not primarily payable by donee of lease.

[Thus where a testator holding lands for which he received rent and paid a head-rent, died leaving arrears of rent due to him which he specifically bequeathed, and also arrears of head-rent due from him, it was held that the latter must be paid out *of the general personal estate in exoneration of the specific legatee. (*h*)

(*f*) Tatlock *v.* Jenkins, Kay 654, where Wood, V. C., said: "Suppose there had been a *devastavit*, could not the person interested in the charge raise the whole charge out of the realty?" As to the effect of a *devastavit* where debts are charged on the real estate "if the personal estate should be insufficient," see Richardson *v.* Morton, L. R., 13 Eq. 123, and cases cit. Id. 125.]

7. A direction to executors to pay all debts will extend to discharging a specific bequest from encumbrance, Brainerd *v.* Cowdrey, 16 Conn. 1.

[(*h*) Barry *v.* Harding, 1 Jo. & Lat. 489; but not so rent falling due after tes-

So a sum due from the testator to his lessor, in respect of a renewal granted during the testator's lifetime, is payable out of the general personal estate, in exoneration of a specific legatee of the leasehold. (*i*) And the specific legatee of leaseholds, on which the testator had covenanted to build, has been held (*k*) entitled to have the covenant performed at the expense of the general personal estate, although the time for performing the covenant has not expired. But where a lessee was liable for dilapidations at the time of his death, it was held that his specific legatee must himself bear the cost of repairs. (*l*)

Nor renewal fines fallen due in testator's lifetime.

Nor the cost of performing a covenant to build.

Secus, as to dilapidations.

Again,] if a testator bequeaths a watch or a painting, and it turns out that at his decease the watch or painting is in pawn, the legatee is entitled to have it redeemed. And by parity of reason if a testator specifically bequeaths a legacy to which he is entitled under a will, and afterwards assigns such legacy by way of mortgage, the legatee may claim to have the mortgage debt liquidated in exoneration of the subject of gift; and it would be immaterial that the mortgage deed contained a power of sale, by virtue of which the mortgagee might have absolutely disposed of the property and thereby have defeated the bequest; (*m*) for in all these cases the mortgage being considered to have been created by the testator for his own convenience, and not for the purpose of subtracting so much from the bequest, the act is not, as between the parties claiming under the will, an ademption *pro tanto*, and cannot, without at least equal impropriety, be termed a partial revocation, though the latter designation has been commonly applied to it. If, therefore, the testator's right of redemption remain unbarred at his decease, the devisee or legatee is entitled to require that it shall be exercised for his benefit. [And if the executor fails to perform this duty the legatee is entitled to compensation.] (*n*)

Chattel must be redeemed for specific legatee.

tator's death, see Hawkins *v.* Hawkins, 13 Ch. D. 470, and per Jessel, M. R., L. R., 20 Eq. 316.

(*i*) Fitzwilliams *v.* Kelly, 10 Hare 266. But not fines falling due on renewals effected upon deaths happening after the testator's death, Id.

(*k*) Marshall *v.* Holloway, 5 Sim. 196. This case was referred by Turner, V. C., in Fitzwilliams *v.* Kelly, 10 Hare 277, to the particular provisions of the will, and not to any general rule of law

(*l*) Hickling *v.* Bowyer, 3 Mac. & G. 643; and see Hawkins *v.* Hawkins, 13 Ch. D. 470. Cf. Harris *v.* Poyner, 1 Drew. 174, 182.]

(*m*) Knight *v.* Davis, 3 My. & K. 358. In this case the mortgage was created for the benefit of the legatee himself.

[(*n*) Bothamley *v.* Sherson, L. R., 20 Eq. 304.]

*Upon the same principle, it has been held that the specific legatee of shares in a railway company or any other such adventure, on which at the testator's death the whole amount subscribed has not been paid, is entitled to have the future calls paid out of the general personal estate, or any other fund on which the testator may have thrown the burden of his debts. (o)

Specific legatee, when entitled to have subscription on shares paid up,

[But this is now considered to have carried the doctrine too far. (p) Assets would be tied up indefinitely until all possible calls were paid up. It is difficult to suppose that a testator ever intended that: it was therefore held by Sir J. Romilly that the liability of the general estate depended on the question whether the calls were made before or after the testator's death. (q) And this was followed by Sir R. T. Kindersley, who said the right principle was that if any payment was necessary at the testator's death to constitute him a complete shareholder, it must be made out of his estate; but if he was then a complete shareholder, whether the concern had advanced to working order or not, all calls made after his death must be borne by the specific legatee. (r) These are incident to the chattel bequeathed like rent to leaseholds. (s)

—when not.

Sir W. P. Wood, indeed, drew a distinction in In re Box, (t) where the whole of a testator's personalty, including shares, was given to be enjoyed in specie by one for life, and the shares were given over after her death; in this case he held that calls made during the life of the tenant for life were payable out of the general assets, since the distribution of them was not thereby delayed beyond the time indicated by the testator. He also held that the tenant for life, being entitled to the specific enjoyment of the whole estate, was entitled to say that the shares should not be touched for the purpose of paying calls, and that the payment must be made out of some part not producing so good an income. But this decision is not easily reconcilable with Fitzwilliams v. Kelly, (u) where, under similar circumstances, except that the property was leasehold, and the payment a fine on renewal, it was held by Sir G. Turner, V. C., that the fine must be borne by the leaseholds

(o) Blount v. Hipkins, 7 Sim. 51; [Jacques v. Chambers, 4 Railw. Cas. 499, 11 Jur. 295, reversing 2 Coll. 435; Wright v. Warren, 4 De G. & S. 367; Clive v. Clive, Kay 600.

(p) By Sir E. Sugden, 1 Jo. & Lat. 490.

(q) Armstrong v. Burnet, 20 Beav. 424; Addams v. Ferick, 26 Beav. 384.

(r) Day v. Day, 1 Dr. & Sm. 261.

(s) Per Jessel, M. R., L. R., 20 Eq. 316.

(t) 1 H. & M. 552.

(u) 10 Hare 266, 276, not cited in In re Box.

alone, the tenant for life (*x*) *keeping down the interest. "I do not know," said the V. C., "how I can hold that the devisee of an estate liable to be defeated (*i. e.*, by the non-payment,) has a right against the general estate of his devisor to have that defeasible estate turned into an indefeasible one, or to be indemnified against the consequences of his own neglect in suffering it to be defeated. The payment of this fine is an element necessarily incident to the preservation of the lease, and the person taking the benefit of the lease must take its burdens also."

Where the person named as legatee repudiates the legacy, he cannot of course be subjected to any of the liabilities attaching to the testator's interest.] (*y*)

Legatee may escape the burden by declining the legacy.

But the points which [in cases not falling within the statute 17 and 18 Vict., c. 113,] have been chiefly in controversy and are here to be considered, are:—

1st, Whether the will indicates an intention that the devisee or legatee shall take *cum onere*; (*z*) and, if not, then, 2ndly, Out of what funds he is entitled to claim exoneration. (*a*) The courts require very clear expressions in order to fasten the encumbrance on the devisee or legatee of the property in question. 8

Mortgaged estate, when to be exonerated.

(*x*) See also as to the proportionate liability of tenant for life and remainderman, Harris *v.* Poyner, 1 Drew. 174, 182. But see *inf.* n. (*s*).

(*y*) Moffett *v.* Bates, 3 Sm. & Gif. 468.

(*s*) It may happen that a devisee for life is to take *cum onere*, while a remainderman is entitled to exoneration, see Sargent *v.* Roberts, 12 Jur. 429, 17 L. J., Ch. 117; and *vice versa*, Whieldon *v.* Spode, 15 Beav. 537.

(*a*) As to the right to exoneration being barred by lapse of time, see Newhouse *v.* Smith, 2 Sm. & Gif. 344.]

8. The heir or devisee is entitled to have his land discharged from mortgage debt by the executor, but this right belongs only to the heir or devisee, and not to his grantees, Keene *v.* Munn, 1 C. E. Gr. (N. J.) 398. See also as to the general rule, Thompson *v.* Thompson, 4 Ohio St. 333; Lennig's Estate, 52 Penna. St. 135; Gould *v.* Winthrop, 5 R. I. 319; Thomas *v.* Thomas, 2 C. E. Gr. (N. J.) 356; Hewes *v.* Dehon, 3 Gray 205; Newcomer *v.* Wallace, 30 Ind. 216; Dandridge *v.* Minge, 4 Rand. (Va.) 397; Stevens *v.* Gregg, 10 Gill & J. 143; Ruston *v.* Ruston, 2 Yeates 54; Hoff's Appeal, 24 Penna. St. 200.

A residuary bequest, "after payment of all debts and charges" against testator's estate, exonerates devised land from the payment of a mortgage upon it, Plimpton *v.* Fuller, 11 Allen 139. And a debt (not secured by mortgage) for an unpaid balance of purchase money is payable out of the personal property, McCracken's Appeal, 29 Penna. St. 426. And the personal estate must be first applied and exhausted, even for the payment of a debt charged by mortgage, if

Devise subject to the mortgage.

Thus it is settled that a devise of lands, *subject to the mortgage or the encumbrance thereupon*, does not so throw the charge on the estate, as to exempt the funds which by law are preferably liable; (*b*) the testator being considered to use the terms merely as descriptive of the encumbered condition of the property, and not for the purpose of subjecting his devisee to the burden,—

the debt so charged was the personal debt of the testator, Estate of Woodworth, 31 Cal. 595; Elliott *v.* Carter, 9 Gratt. 541, 549; Slack *v.* Emery, 3 Stew. (N. J.) 458.

So, too, in regard to a debt which is equivalent to a mortgage, in regard to which it was said by Ruffin, J., in Robards *v.* Wortham, 2 Dev. Eq. 173, 176: "It is a legislative mortgage which creates a specific lien. (Rev., c. 959, §§ 1, 8.) In that case, the heir or devisee of the land has the same right to ask exoneration out of the general residue of the personalty, as he had in the case of the specialty, unless the ancestor or devisor was a purchaser of the estate while under the encumbrance; for residuary legatees are *ex vi termini* only entitled to the surplus after payment of debts. But in like manner also as before, specific and even pecuniary legatees are protected, or rather are to be indemnified. O'Neal *v.* Mead (1 P. Wms. 693) is an instance of this, where the legacy was specific, and the mortgaged freehold devised. The devisee took it *cum onere*. Rider *v.* Wager (2 P. Wms. 335) and Tipping *v.* Tipping (1 Id. 370) carry the rule to pecuniary legacies. In the former there were both specific and pecuniary legacies; and it was held, that neither should be defeated, but the devised land must pay the debt, with which it was specifically charged. Much more is this the case, where the land descends; for such lands are liable before estates devised, which are always specific."

Where a testator conveyed to W. property subject to a mortgage, reserving in himself a life estate, and at the same time made his will, by which he devised the same property to W., and then died, W., having accepted and recorded the deed, is seized of the property as the *grantee* of the testator, and not as his *devisee*, upon the termination of the life estate reserved, and therefore cannot call upon the personal assets of the testator's estate to pay off the mortgage and exonerate that real estate from the mortgage debt, Estate of Wisner, 20 Mich. 442.

And even where there is a statute similar to that of 17 and 18 Vict., c. 113, as in New York, (1 R. S. 749, § 4,) the old rule still applies if there is a direction on the testator's part that his executors pay all his debts "on bond and mortgage," Rapalye *v.* Rapalye, 27 Barb. 620; and where testator *conveyed* mortgaged lands to some of his children, and *devised* other mortgaged lands to others of his children, at the same time, such direction will apply to all, Waldron *v.* Waldron, 4 Bradf. 114; so in case of a devise of mortgaged land, with direction to executor to pay off the mortgage, although the testator subsequently conveyed the property to the devisee, "subject to" the mortgage, Bradford *v.* Forbes, 9 Allen 365.

(*b*) Serle *v.* St. Eloy, 2 P. W. 386; Duke of Ancaster *v.* Mayer, 1 B. C. C. 454; Astley *v.* Earl of Tankerville, 3 B. C. C. 545, 1 Cox 82; [Barnewell *v.* Lord Cawdor, 3 Mad. 453; Phillips *v.* Parker, Taml. 136]; Bickham *v.* Crutwell, 3 M. & Cr. 763; [Townshend *v.* Mostyn, 26 Beav. 72.] See also Lord Eldon's judgments in Milnes *v.* Slater, 8 Ves. 306; Bootle *v.* Blundell, 1 Mer. 227, and Noel *v.* Lord Henley, in D. P., 1 Dan. 336, [12 Pri. 213.

a construction which, though well established, it is probable generally defeats the intention.

Devise subject to specified part of mortgage.

[So where a testator having two estates subject to one mortgage devised one estate to A subject to the payment of part of the debt, and the other to B subject to the payment of the *residue, it was held that this only fixed the proportions in which the estates *inter se* were to bear the charge, and did not imply that the devisees were to take them *cum onere.*] (c)

Devise upon trust to sell and pay mortgages does not make mortgaged lands primarily liable.

And even where lands were devised upon trust for sale, and the proceeds were to be applied in the first [place to pay off a mortgage debt of £6000 charged on another estate, (d) and in the next place to pay off all other mortgages charged on the lands devised,] Sir J. Leach, M. R., held that, as it appeared on the whole will that the testator did not intend to exonerate his personal estate from the mortgage debts, the devisees of the residue of the proceeds of the fund were entitled, under the general rule, to have the personalty applied in exoneration of the lands devised. (e)

Effect of words "he paying the mortgage thereon."

[Where an estate in mortgage was devised to A "he paying the mortgage thereon," Lord Langdale held, that this imposed a condition on the devisee and exonerated the personal estate; (f) but the decision is directly opposed to two uncited cases; (g) in which it was held that similar words applied to debts and legacies did not impose a condition.]

Funds liable to exonerate mortgaged estate.

Suppose, then, that the will contains no intimation of an intention to the contrary, the devisee of a mortgaged estate is entitled to have the encumbrance discharged out of the following funds:—1st, *The general personal estate;* (h) 2ndly, *Lands expressly devised for payment of debts;* (i) 3rdly, *Lands descended to the*

(c) Goodwin *v.* Lee, 1 K. & J. 377.

(d) The payment of this mortgage debt was by a codicil expressly thrown on the mortgaged estate in exoneration of the personal estate, and it is presumed, though the report is not clear on the subject, that the personalty was not, in direct contravention of the codicil, held liable to the discharge of this debt.]

(e) Wythe *v.* Henniker, 2 My. & K. 635. [But according to Webb *v.* Jones, *post*, the decision should have been otherwise, for another reason.

(f) Lockhart *v.* Hardy, 9 Beav. 379. See Hatch *v.* Skelton, 20 Beav. 453.

(g) Bridgman *v.* Dove, 3 Atk. 201; Mead *v.* Hide, 2 Vern. 120, noticed *post.*]

(h) Phillips *v.* Phillips, 2 B. C. C. 273, and cases cited.

(i) Serle *v.* St. Eloy, 2 P. W. 386; [Lomax *v.* Lomax, 12 Beav. 285]; and other cases cited *ante* p. *622.

heir; (*k*) and 4thly, *Lands devised charged with debts:* (*l*) and if the charge happened to reach the last class of estates, and if the devised mortgaged estate were included therein (as it of course would be if the charge were general,) the devisee in question would be liable to contribute ratably with the other devisees. (*m*)

Not specific legacies;

*But the devisee of a mortgaged estate is not entitled to have it exonerated out of *personalty specifically bequeathed,*[9]—a point which was determined in O'Neal *v.* Mead, (*n*) where a testator having devised lands, which he had mortgaged, to his eldest son in fee, and bequeathed a leasehold estate to his wife, it was held that the leasehold premises, being specifically bequeathed, were not liable to pay off the mortgage.

And *a fortiori* a specific legatee of encumbered leaseholds cannot call upon a specific legatee of unencumbered leaseholds to contribute towards the liquidation of the mortgage debt affecting the former exclusively; and a direction that the mortgage money shall be paid out of the general personal estate would not confer such right. (*o*)

(*k*) Galton *v.* Hancock, 2 Atk. 424, 427, 430; [Davies *v.* Topp, 2 B. C. C. 259, n.]; and other cases cited *ante* p. *622.

[(*l*) Bartholomew *v.* May, 1 Atk. 487, 1 West 255; Middleton *v.* Middleton, 15 Beav. 450.]

(*m*) Carter *v.* Barnardiston, 1 P. W. 505; [Middleton *v.* Middleton, 15 Beav. 450; Harper *v.* Munday, 7 D., M. & G. 369.]

9. Though a mortgage debt be payable at common law primarily out of the personal estate, yet a legatee thereby deprived of his legacy has right of subrogation against lands descended to the heir, to the extent of his legacy or of the personal estate so appropriated, Mollam *v.* Griffith, 3 Paige 402.

The mortgaged land is exonerated neither against specific or pecuniary legacies, but only against the residue, Hoff's Appeal, 24 Penna. St. 200; Ruston *v.* Ruston, 2 Dall. 243; S. C., 2 Yea. 63; Gould *v.* Winthrop, 5 R. I. 319; Mason's Estate, 1 Pars. Cas. 129.

And see the remarks of Beasley, C. J., in Thomas *v.* Thomas, 2 C. E. Gr. (N. J.) 356, to the effect that where a specialty debt of the testator has been secured by his mortgage on land afterwards devised by him, the personal property not specifically bequeathed is the primary fund for its payment, but the mortgaged land is next liable before the personal property specifically bequeathed.

It is the duty of an executor or administrator to apply the assets of the estate, not necessary for the payment of other debts, to the exoneration of the real estate of his testator or intestate, which may be under mortgage, Dandridge *v.* Minge, 4 Rand. (Va.) 397.

In the administration of assets of an insolvent testator or intestate, mortgages, as mortgages, are not entitled to priority over rent, specialties, and simple contract debts, except so far as they are "*liens* on any particular part of the estate," Kinard *v.* Young, 2 Rich. Eq. 247. After the *lien* is exhausted, the grade of the demand must be determined by the nature of the instrument which the mortgage was given to secure, Id.

(*n*) 1 P. W. 693; [Emuss *v.* Smith, 2 De G. & S. 737, 738.]

(*o*) Halliwell *v.* Tanner, 1 R. & My. 633.

It is clear, also, that the devisee of a mortgaged estate cannot claim exoneration as against pecuniary legatees. Thus, in Lutkins *v.* Leigh,(*p*) where the testator having mortgaged certain lands, devised them to his wife for life, with remainder over, and gave her a legacy of £1500, and bequeathed the residue of his personal estate to other persons. The personal estate not being sufficient to pay the £1500 and liquidate the mortgage, Lord Talbot held that the devisees must take the devised estate *cum onere.*

nor pecuniary legacies;

And, of course, such a devisee is not entitled to call upon the devisees of other lands, not charged by the testator with debts, for contribution, although such other estates were liable to the *creditor.*(*q*) It is true that a devisee of encumbered land can only claim exoneration out of property which the creditor of the testator can reach, but the converse of the proposition is not true.[10]

nor other devised lands.

The application of descended estates in exoneration of a devised estate has been generally thought to be a hardship upon the heir; but such an opinion can only be maintained on a ground which would go to prove that the estate ought not to be exonerated at all, namely, that the devisee was intended to take *cum onere,* which is probably in general the case; for if it be admitted that the testator meant the encumbrance to be *liqui-

As to descended estates exonerating devised estates.

(*p*) Cas. temp. Talb. 53. See also Lacy *v.* Gardener, Bunb. 137; and Lord Loughborough's judgment in Hamilton *v.* Worley, 2 Ves., Jr., 65; [Johnson *v.* Child, 4 Hare 87.]

(*q*) Lord Hardwicke's judgment in Galton *v.* Hancock, 2 Atk. 438; [Emuss *v.* Smith, 2 De G. & S. 722.] In the former case the debt was secured by bond, a circumstance not now a necessary ingredient in the case. *Vide ante* p. *583.

10. In Ruston *v.* Ruston, 2 Yeates 54, 61, it is said by M'Kean, C. J.: "A mortgage is a debt; it arises on a loan, and there is usually a covenant to pay the money; it is a specialty debt. T. R. is *hæres factus* of the whole real estate, on his payment of £3000, and if that sum had been more than sufficient to pay off all the particular pecuniary legacies, I would be of opinion that the mortgage should be paid out of the residue of that sum, as much as any other debt, and that he should not take the estate with this additional encumbrance. It appears nowhere in the will that the testator meant the defendant should take the lands with this lien upon them.

"It is the constant practice in chancery to allow to children the same favor as creditors. * * * I therefore think that the specific and particular pecuniary legacies, bequeathed to the children, ought not to be brought in ease of the particular lands mortgaged; but it seems to me that the devise of the residuary part of the personal estate should give way to the devise of the real estate subjected to the mortgage, and be applied so far as it will go in discharge of the mortgage. For the devisee of the real estate must take it *cum onere,* that is, subject to the mortgage, unless the residue of the personal estate will be sufficient to discharge it." See *ante* note 8, p. 469, and note 9, p. 472, and cases therein cited.

dated, it would seem to follow that the devisee should be placed in the same position as if the mortgage were a debt not affecting the estate, and should only be liable to contribute to or pay it precisely to the same extent as any other claim upon the *general* assets: though the courts, it will be observed, have not carried the rule quite so far. The extent of the devisee's claim to exoneration seems now to be well defined by the cited cases.

Heir entitled to exoneration.

So where an estate *descends* subject to a mortgage, the heir is entitled to exoneration out of those funds which in the established order of application (*r*) are anterior to the descended assets, namely, the general personal estate, and realty expressly devised for the payment of debts. (*s*)

Exoneration doctrine does not extend to estates which came to the testator *cum onere*.

The principle of the preceding cases, however, extends only to encumbrances created by the testator or ancestor himself; for the claim to exoneration is founded on the notion that the personal estate of the testator who made the mortgage had the benefit of its creation, and therefore shall be the fund to liquidate it; and cases which do not fall within the reason are excluded from the operation of the rule. Thus it is clear that where the estate has come to the last owner, either by devise or descent, encumbered with a mortgage, and he has done no act in his lifetime evincing an intention to make the debt his own, the personal estate (not having had the benefit of the mortgage) will not be liable to pay it; but the devisee or heir of the last owner will take the estate *cum onere;* nor, it seems, will the act of such last owner, rendering himself personally liable to the debt, [even though he be also residuary legatee of the first mortgagor's personal estate,] in every instance transfer it to himself as between *his own* representatives, unless such appears upon the whole transaction to have been his deliberate intention. 11 (*t*)

Unless he manifest an intention to adopt the debt.

(*r*) See *ante* p. *622.

(*s*) Hill *v.* Bishop of London, 1 Atk. 621; [Chester *v.* Powell, 7 Jur. 389; Yonge *v.* Furse, 20 Beav. 380. The first case is a peculiar one. The mortgaged lands were copyholds, (which were not then assets either at law or in equity,) and the copyhold heir was held entitled to be exonerated out of lands specifically devised, though merely *charged* with debts. If he had been heir of fee-simple lands, the lands descended would have been liable before the lands charged, see order of liability, *ante* p. *622.]

11. But the agreement of the testator, subsequent to his acquiring the estate *cum*

(*t*) Scott *v.* Beecher, 5 Mad. 96; [Earl of Ilchester *v.* Earl of Carnarvon, 1 Beav. 209; Earl of Clarendon *v.* Barham, 1 Y. & C. C. C. 688; Swainson *v.* Swainson, 6

*Thus it has been held that the giving a bond or covenant on the transfer of the mortgage has no such effect, (u) even though [the conveyance on transfer be made freed from the old equity of redemption and subject to a new proviso, and] include an agreement to pay a higher rate of interest, (x) or a further sum be advanced to pay an arrear of interest on such mortgage, (y) in which case the effect is merely to convert interest into principal; and in Duke of Ancaster v. Mayer, (z) it was so decided, though a small further principal sum was advanced, and a further real security given for the whole.

Acts not amounting to adoption.

Nor in such a case is the personal estate of the last owner rendered primarily liable by a covenant or bond given for particular purposes, as upon the apportionment of the debt among several persons entitled to different parts of the property subject to the charge. (a) [Nor where the equity of redemption has become divided among several

owner, to pay a higher rate of interest on the mortgage, seems to be taken as a manifestation of an intention to adopt the debt, Hoff's Appeal, 24 Penna. St. 200.

(u) Bagot v. Oughton, 1 P. W. 347; Evelyn v. Evelyn, 2 Id. 664; Leman v. Newnham, 1 Ves. 51; Lacam v. Mertins, Id. 312. See also Robinson v. Gee, Id. 251; Duke of Ancaster v. Mayer, 1 B. C. C. 454; Earl of Tankerville v. Fawcett, 1 Cox 237, 2 B. C. C. 57.

(x) Shafto v. Shafto, 1 Cox 207, 2 Cox's P. W. 664, n. [This case seems to overrule Donisthorpe v. Porter, 2 Ed. 162, where it was held that a bond and covenant and reservation of a new equity of redemption made the personal estate of the heir primarily liable, but the exact nature of the transaction is not stated; it seems to have been a mortgage to a person already entitled to a charge raisable under the trusts of a term.]

(y) Earl of Tankerville v. Fawcett, 1 Cox 237, [2 B. C. C. 57; and see Shafto v. Shafto, *supra*, where it was held that an arrear of interest due on the death of the devisee in fee was a charge on the mortgaged property, in exoneration of his personal estate; *contra* as to a devisee for life, or an infant devisee in tail, who must keep down the interest, so far at least as the rents and profits will go, Burgis v. Mawbey, T. & R. 167. A further sum, advanced for the owner's own personal benefit, will of course remain his own personal debt, Lacam v. Mertins, 1 Ves. 312.]

(z) 1 B. C. C. 454; but see Woods v. Huntingford, 3 Ves. 128; [and Lushington v. Sewell, 1 Sim. 435.]

(a) Forrester v. Leigh, Amb. 171, 2 Cox's P. W. 664, n.; Billinghurst v. Walker, 2 B. C. C. 604, as to which, see Sir W. Grant's judgment in Earl of Oxford v. Rodney, 14 Ves. 425.

D., M. & G. 648. In Bond v. England, 2 K. & J. 44, Wood, V. C., said these decisions proceeded on the ground that the same party had both funds under his control. This is not easily to be collected from the reports. However, the V. C. held them not applicable to the case then before him, where the testator had never administered at all to the estate of the original mortgagor, and so could not be said to have ever had his personal estate under his control.]

persons does a new proviso for redemption, providing for reconveyance to each person of his own share, throw the debt upon such persons personally, since it only expresses what the law would imply. (*b*)

Where debt or security divided into two parts, held a new mortgage.

But in Barham *v.* Earl of Thanet, (*c*) *part* of the mortgage debt and *part* of the lands only were transferred, the transferror (or last owner) covenanted to pay the transferred portion of the debt with interest at a different rate, and there was a new proviso for redemption on payment of that portion with interest at the end of *five* years, the remainder of the debt continuing on the *remainder of the old security; and Sir J. Leach held that the last owner had taken the debt upon himself, and that in substance the transaction was not an assignment of part of the original mortgage debt, but a *release* of part of the security and a new mortgage. It is presumed that he considered that nothing could be considered as mere assignment which did not leave the *whole* lands subject to the *whole* debt. Here the equities were certainly altered, for the mortgagor might, as he in fact did, redeem one mortgage without the other.

Case where held that heir had elected to make debt his own.

Again, in Bruce *v.* Morice, (*d*) a mortgaged estate was devised to the testator's eldest son in tail, and other lands were devised to trustees, upon trust to sell and pay debts, and pay the surplus to his said son; but if the son should satisfy the creditors, the trustees should desist from the sale. The trustees never acted, and the son entered on both estates, never paid the mortgage debt, but joined in a transfer with a new proviso for redemption and a covenant for payment, with interest at a different rate. It was held by Sir J. K. Bruce, V. C., that the son's personal estate was primarily liable, on the ground that he must be presumed to have acted as he did in pursuance of the will, which gave him the option of preventing a sale by taking the debts on himself.

In Townshend *v.* Mostyn, (*e*) there was at the testator's death a debt of £20,000 secured by mortgage on an estate which had come to him from his father subject to a portion of the debt, the testator having himself created the residue of the debt and covenanted for payment of the whole. Sir J. Romilly, M. R., held that the whole £20,000 had

[(*b*) Hedges *v.* Hedges, 5 De G. & S. 330.

(*c*) 3 My. & K. 607.

(*d*) 2 De G. & S. 389. The son was also residuary legatee; but as to that, see Earl of Clarendon *v.* Barham, 1 Y. & C. C. C. 688; he was also from the first surety for the debt, but the *ratio decidendi* was that stated in the text.

(*e*) 26 Beav. 72.]

become the debt of the testator, and that the devisee must be exonerated.]

Where a testator charges his estate with the payment of his debts, an encumbrance on a real estate devised or descended to him will not be considered as his debt, so as to bring it within the operation of the charge.

Charge of debts confined to testator's own debts.

Thus, in Lawson *v.* Lawson, (*f*) where A, being the devisee of real estate which was subject to certain encumbrances, died, leaving the estate so subject, and having by his will charged his real and personal estate with the payment of his debts, and *devised the real estate to B, and appointed his wife executrix. The wife having in the administration of the assets paid off the charge on the real estate devised by the first testator, it was held that she was entitled to satisfaction from B, whose estate was thus exonerated; for that A, in charging his estate with his debts, could not intend to encumber it with debts which were not his in contemplation of law.

And where a person, to whom lands are devised or descend subject to the payment of debts or legacies, executes a bond [or promissory note] or a mortgage of the devisor's or ancestor's estate to raise money for payment of the debts, (*g*) or to a legatee to secure his legacy, (*h*) he has not by these acts primarily subjected his personal estate. Such also was adjudged to be the result where the heir mortgaged an estate to pay simple contract debts owing by his ancestor to which the real estate was not liable. (*i*)

Acts not amounting to adoption of debt.

The same doctrine, to a certain extent at least, applies to cases in which the estate was *purchased* by the testator subject to the charge; for it has been held that "where a man buys subject to a mortgage, and has no connection, or contract, or communication with the mortgagee, and does no other act to show an intention to transfer the debt from the estate to himself, as between his heir and executor, but merely that which he must do if he pays a less price for it in consequence of that mortgage; that is, indemnifies the vendor against it, he does not by that act take the debt upon him-

Rule where testator purchases *cum onere*.

(*f*) 3 B. P. C. Toml. 424. See also Lawson *v.* Hudson, 1 B. C. C. 58; Hamilton *v.* Worley, 2 Ves., Jr., 62, 4 B. C. C. 199.

(*g*) Perkyns *v.* Baynton, 2 Cox's P. W. 664, n.; Bassett *v.* Percival, 1 Cox 268; Noel *v.* Lord Henley, 7 Pri. 241, Dan. 211, 322, [12 Pri. 213.]

(*h*) Hamilton *v.* Worley, 2 Ves., Jr., 62, 4 B. C. C. 199; [Matheson *v.* Hardwicke, 2 Cox's P. W. 665, n.]

(*i*) Earl of Tankerville *v.* Fawcett, 1 Cox 237, 2 B. C. C. 57.

self personally;" (*k*) but at his death the person upon whom the estate devolves takes it *cum onere*. (*l*)

Covenant with the *vendor;*

And it is immaterial whether the covenant with the vendor be to pay the debt or to indemnify him against it. (*m*) 12

(*k*) Per Sir R. P. Arden, M. R., in Woods *v.* Huntingford, 3 Ves. 128.

(*l*) Cornish *v.* Shaw, Ch. Cas. 271; Pockley *v.* Pockley, 1 Vern. 36; Duke of Ancaster *v.* Mayer, 1 B. C. C. 454.

[(*m*) Tweddell *v.* Tweddell, 2 B. C. C. 101, 152]; Butler *v.* Butler, 5 Ves. 534.

12. It has been held that an encumbrance placed upon land by the testator to secure part of the purchase money for it is a debt to be paid primarily by the personalty, but encumbrances subsisting on the land at the time of its purchase by the testator are to be borne primarily by the land, Hewes *v.* Dehon, 3 Gray 205; McLenahan *v.* McLenahan, 3 C. E. Gr. (N. J.) 104; and that notwithstanding a covenant in the deed to the testator, whereby he assumed the payment of the encumbrance, Cumberland *v.* Codrington, 3 Johns. Ch. 229. In Keyze's Case, 9 Serg. & R. 73, Tilghman, C. J., says: "If A purchase an estate subject to a mortgage and die, his personal estate shall not be applied to the exoneration of the land unless he has done some act by which he has made the debt his own." So Mason's Estate, 1 Pars. Cas. 129. See, too, Lennig's Estate, 52 Penna. St. 135. So where the encumbrance is a dower right existing prior to testator's purchase, Bell's Ex'r *v.* Bell, 32 Penna. St. 309.

"Where a person becomes entitled to an estate subject to a charge, and then covenants to pay it, the charge still remains primarily on the real estate; and the covenant is only a collateral security; because the debt is not the original debt of the covenantor," 2 Story Eq. Jur., § 1248; Mitchell *v.* Mitchell, 3 Md. Ch. Dec. 73; M'Learn *v.* M'Lellan, 10 Peters 625.

In the latter case, at page 644, it was said by M'Lean, J.: "If the contract be personal, although a mortgage be given, the mortgage is considered in aid of the personal contract; and, on the decease of the mortgagor, his personal estate will be considered the primary fund, because the contract was personal; but if the estate descend to the grandson of the mortgagor, then the charge would be upon the land, as the debt was not the personal debt of the immediate ancestor.

"And so, if the contract was in regard to the realty, the debt is a charge on the land. It is in this way that a court of chancery, by looking at the origin of the debt, is enabled to fix the rule between distributees.

"In the case under consideration, the mortgage was given by James H. M'Learn, but it was not given to secure a debt created by him. The mortgage merely changed the security, but did not affect the extent of the judgment lien. And this judgment was obtained, chiefly, for the purchase money of the estate. In effect, the debt for which the judgment was obtained against Archibald M'Learn, and for which the mortgage was given, constitute an equitable lien on the land; and had the mortgage covered only the land, it must have been considered the primary fund. The debt for which the mortgage was given, was not the personal contract of James H. M'Learn, but the contract of his ancestor in the purchase of the estate. But if the contract was personal, and might have been a charge on the personal estate devised to James H. M'Learn, yet the character of the debt, in this respect, is changed in the hands of the present heirs. In the lan-

But if the *mortgagee* be a party to the transaction, the vendee covenanting with *him* to pay the debt, and the estate be subjected to a fresh proviso for redemption, it will be considered, with respect to the purchaser's representatives, as a purchase of the whole estate, not of the equity of redemption merely. (*n*)

—with the *mortgagee;* this amounts to adoption of debt.

*And the same principle of course applies where upon the purchase the mortgage is transferred to a new mortgagee, who advances a further sum of money.

Thus in Woods *v.* Huntingford, (*o*) where the deceased ancestor, having purchased the equity of redemption in consideration of his agreeing to take upon himself the mortgage debt, afterwards obtained a further sum from the mortgagee, and executed to him a mortgage for the whole; Sir R. P. Arden held that he had made the mortgage debt his own, so as to entitle the heir upon whom the land had descended to have it exonerated out of the personal estate.

guage of Lord Eldon, this debt cannot be a charge on the personalty, because it was not created by the personal contract of James H. M'Learn.

"This, under the authorities cited, would be the rule for the payment of the mortgage debt, if James H. M'Learn had not executed a mortgage on the personal as well as the real property, which, as devisee, he received from his father.

"This mortgage on the personal property cannot be considered in the light of additional surety to the lien which before existed. If it could be considered in this light, the land would still be the primary fund, and the personal mortgage as surety or auxiliary to the land. But this mortgage can in no respect be considered as additional surety. It might have been so considered in reference to the equitable lien of the vendor for the purchase money, as such lien was limited to the land; but the lien of the judgment obtained against the ancestor of James H. M'Learn, and for which the mortgage was substituted, extended, as before remarked, to the personal as well as real estate of the defendant.

"The debt then for which the mortgage was given did not arise from the personal contract of James H. M'Learn, but by the contract of his ancestor; and the mortgage was given in discharge of the judgment. This created no new lien upon the personal property. It came to James H. M'Learn, under the will of his father, subject to the lien of the judgment. The mortgage then did not and was not intended to create any new charge upon the personalty; but to continue, in a different form, that which already existed."

See also Goodburn *v.* Stevens, 1 Md. Ch. Dec. 420, 441.

(*n*) Parsons *v.* Freeman, 2 Cox's P. W. 664, n., [Amb. 115, n. by Blunt, where it appears that there was a separate agreement by the purchaser with the mortgagee, so that the case is not opposed to the authorities cited in the last note, as to which see per Sugden, C., in Barry *v.* Harding, 1 Jo. & Lat. 485, 486.] Earl of Oxford *v.* Lady Rodney, 14 Ves. 417; Waring *v.* Ward, 5 Ves. 670, 7 Ves. 332.

(*o*) 3 Ves. 128. Compare this case with Duke of Ancaster *v.* Mayer, 1 B. C. C. 454, noticed *ante* p. *638, which it is remarkable was not cited by the M. R.

Distinction between purchaser of equity of redemption and heir or devisee.

From the observations of the M. R. in this case, it is to be inferred that he thought that almost any dealing by *a purchaser* of an equity of redemption with the mortgagee, by which he had rendered himself liable to him to pay the debt, would amount to an adoption of the debt, as between his own representatives. He observed, that in most of the cases collected by Mr. Cox, in his note to Evelyn *v.* Evelyn,(*p*) (on which he pronounced a high enconium), the estate had come to the owner *by descent or devise.*(*q*)

Debt belongs to purchaser *where it forms part of the price.*

But it is clear that an actual dealing with the mortgagee is not essential to render the debt personal to the purchaser, for the same effect will be produced if the transaction between the vendor and vendee is such as to show that the purchase was inclusive of the mortgagee's interest in the land, not of the equity of redemption only, the mortgage *debt forming part of the price of the estate.*(*r*)

This doctrine was distinctly recognized by Lord Thurlow in Billinghurst *v.* Walker;(*s*) but it is difficult to reconcile with that *recognition his decision in Tweddell *v.* Tweddell,(*t*) that the debt had not been adopted by the purchaser, where the purchase money, as stated in the recital of the conveyance, included the mortgage debt, although in the *testatum* clause the consideration was stated to be the amount of the mortgagor's proportion exclusive of that debt, and the covenant thereinafter contained; and the vendee then covenanted to indemnify the vendor against the payment of the mortgage debt.

Case of Earl of Belvidere *v.* Rochfort.

Still more difficult is it to reconcile with the rule in question Lord Thurlow's disapproval of Earl of Belvidere *v.* Rochfort,(*u*) which was as follows:—A mortgaged to B for

(*p*) 2 P. W. 664, n.

(*q*) The principal exception is Forrester *v.* Leigh, 1753, 2 Cox's P. W. 664, n., Amb. 171, where the testator had purchased several estates subject to mortgages, with regard to one of which he entered into a covenant for payment of the mortgage money, for the purpose *of indemnifying a trustee;* and as to another, which was part only of an estate subject to a mortgage, upon splitting the encumbrance, both parties reciprocally covenanted to pay their respective shares and indemnify each other. Lord Hardwicke thought that these covenants would not have the effect of making the mortgages personal debts of the testator, being entered into for *particular purposes* only.

(*r*) Cope *v.* Cope, 2 Salk. 449; Earl of Belvidere *v.* Rochfort, 5 B. P. C. Toml. 299, but as to which see *post* p. *643.

(*s*) 2 B. C. C. 608.

(*t*) 2 B. C. C. 101, 151. See Sir W. Grant's observations upon this case, in Earl of Oxford *v.* Lady Rodney, 14 Ves. 423.

(*u*) 5 B. P. C. Toml. 299.

£450 and interest. A afterwards agreed with C for the sale of the premises for £900, and subsequently, in consideration of £900 conveyed the premises to C and his heirs. In the covenant against encumbrances the mortgage made to B was excepted, and it was added, "which said principal money of £450 with interest thereof from the 10th day of February last past before the date hereof is to be paid and discharged by the said C (the purchaser), his heirs and assigns, *out of the consideration money in this present deed expressed.*" (x) And endorsed on the conveyance was a receipt, signed by A (the vendor), acknowledging the receipt of the £900 thus, "£450 sterling in money on the perfection of the deed, and £450 *allowed on account of the mortgage.*" C did not pay off the mortgage debt in his lifetime, and devised the premises to D in fee, whom he made his residuary legatee and executor. D also died without paying off the mortgage debt, and by his will devised the estate in question to E in fee, and bequeathed the residue of his personal estate to F, whom with another he made executors. Lord Lifford decreed that the mortgage was to be considered as the debt of C (the original purchaser), and that his personal estate, which came to the hands of D his executor, and since to the hands of F (the residuary legatee and one of the executors of D), was liable to its liquidation. (y) Against this decree F appealed to D. P., contending that the mortgage was not the debt of C, and, if it were, that E, as the devisee of D, the devisee of C, was not entitled to have it exonerated out of the assets of C the original testator. *On the other side it was insisted that the transaction of C with A was upon the face of it a contract, not for the purchase of the equity of redemption only, but of the land itself. The plain intent of the deed was to put the purchaser in the place of the vendor, who was to be no longer liable, (z) and, that he might not be so, a sufficient part of the purchase money was left in the purchaser's hands for satisfaction of the mortgage, the purchaser thereby taking upon himself the vendor's bond and covenant for payment of the mortgage, as fully as if he had himself covenanted to pay

Mortgage money held to form part of the price.

(x) It appears from the answer of the defendant in the original cause, that there was a covenant to indemnify the vendor from the debt, but it is not stated in the case, and according to the view in which that circumstance is now regarded, was certainly not material.

[(y) Wallis, by Lyne, 45.]

(z) *I. e.*, as between the vendor and vendee, for it is clear they could not affect the right of the mortgagee to resort to the vendor, his original debtor.

it off, and either the vendor or mortgagee might upon that contract have compelled him to pay it off. The decree was affirmed.

Earl of Belvidere v. Rochfort disapproved of by Lord Thurlow.

Of this case Lord Thurlow has observed, (a) "The House of Lords were of a different opinion to what I entertain upon this case: the personal estate never was liable, and the party never was liable to an action of covenant. In that case George (*i. e.*, D in the preceding statement) had a fee simple in the estate; he was capable of giving it after the charges were extinguished; however it was held, *contrary to my opinion*, that the personal estate was liable."

Observations.

It is true that the purchaser was not liable to an action of COVENANT *at the suit of the mortgagee* (to whom his lordship must have referred), who was not a party to the deed. If this be considered necessary, in order to transfer the debt to the purchaser as between his own representatives, it is idle to say that the mortgage money *may* form part of the price between the mortgagor and his vendee. But surely there can be no doubt that the purchaser would be liable to an action *for money had and received*, at the suit of the mortgagee, where, as in Belvidere *v.* Rochfort, the mortgage debt constitutes part of the purchase money, and is retained by him expressly on account of the mortgagee. To affirm that the mortgage debt does not form part of the price in such a case, is virtually to declare that it never can.

Observations on Earl of Belvidere v. Rochfort.

Lord Thurlow's disapproval of this case is rendered more extraordinary by the circumstance of his having been the leading counsel *for the respondent* in the appeal, and, it is probable, contributed greatly by the force of his arguments (which are unanswerable) to the result. But the writer cannot help dis*trusting his own impressions upon the subject, strong as they certainly are, when he finds that the opinion of Lord Thurlow (himself a high authority) has been acquiesced in by Lord Alvanley, who in Woods *v.* Huntingford, (b) said, "Lord Thurlow intimates his doubt of Lord Belvidere *v.* Rochfort, upon which therefore I shall not rely, *as there are many difficulties occurring against that judgment, though by so high an authority.*"

[In Barry *v.* Harding (c) the conveyance of the estate to the testator

(a) See Tweddell *v.* Tweddell, 2 B. C. C. 107.

(b) 3 Ves. 131.

[(c) 1 Jo. & Lat. 475.]

was expressed to be made by the mortgagor and mortgagee, in consideration of the amount of the mortgage money paid to the latter, and of a further sum (stated to be the price of the equity of redemption) paid to the former; but in fact the mortgage money was never paid, and the mortgagee never executed the deed. Under these circumstances Sir E. Sugden held that there was no contract between the vendor and purchaser to make the mortgage money the debt of the latter, the only contract was that it should be immediately paid, and he held that this did not throw the debt personally on the purchaser.]

Conveyance in consideration of mortgage money and another sum, but mortgagee does not execute.

It were much to be wished, that instead of adopting a rule out of which have grown so many distinctions, the courts originally had said, that, wherever a man purchases an equity of redemption, since he is liable in equity, whether he makes an express stipulation or not, (*d*) to indemnify the vendor from the payment of the mortgage debt, and his own personal estate has in effect had the benefit of it in the reduced price of the estate, the debt has become for all purposes his own. But whatever be the purchaser's intention on the subject, such intention should, in order to avoid dispute be distinctly expressed in the deed by which the equity of redemption is conveyed to him.

General remark on the doctrine.

[The statute 17 and 18 Vict., c. 113, has rendered these distinctions comparatively unimportant. For even assuming the purchaser to have made the debt his own, it seems that the statute interposes, and, unless a contrary intention is signified by some further act of the deceased, makes the mortgaged land the primary fund for payment of the charge upon it. (*e*)

Another exception to the general rule is where the mortgage *money never was strictly a debt but merely money agreed to be settled, even though the security comprise a covenant for payment. In such cases the mortgaged property is primarily charged. Thus where a testator on the marriage of his daughter agreed to secure to trustees £6000 for her marriage portion, to be paid at the end of twelve months after his death, and for that purpose demised certain lands to the trustees for a term of years by way of mortgage for securing the principal sum and interest,

Money settled and secured by mortgage held primarily a charge on the land.

(*d*) See Lord Eldon's judgment in Waring *v.* Ward, 7 Ves. 337.

[(*e*) Per Romilly, M. R., in Hepworth *v.* Hill, 30 Beav. 483.

for the payment of which he also bound himself personally by covenant, and then devised the lands subject to the charges and encumbrances existing thereon, Sir L. Shadwell, V. C., said the covenant was a mere matter of form and only auxiliary, and that at the time the charge was created it was not the personal debt of the party, but merely a provision by settlement which must be satisfied out of the property on which it was secured. (*f*)

Money raised under power by tenant for life not his personal debt; nor money previously charged, and to which the settlement is made subject.

Again, where a tenant for life of settled property raises by mortgage under a power a sum of money for his own use, and covenants for payment of it, his personal estate is not primarily liable, though it received the benefit; (*g*) and the same holds with respect to a debt incurred and secured on the property by the settlor himself, prior to the settlement, which is afterwards made expressly subject to the charge, (*h*) and if the settlor subsequently pays off any of the charges he becomes himself an encumbrancer to that extent. (*i*) On the other hand, where the settlement contains a covenant for payment of the charge by the settlor his personal estate is primarily liable. (*j*)

Contra where a covenant to pay the charge.

Whether failure of limitations in lifetime of tenant for life affects primary liability of land, and *vice versa*.

Where a tenant for life with a power to charge and (after intermediate limitations) the remainder in fee to himself creates a charge, and afterwards by failure of the intermediate limitations becomes entitled in fee, it does not seem certain whether *his personal estate would be primarily liable; clearly if he had died tenant for life it would not, (*k*) and perhaps even the devolution upon him during his life of

(*f*) Graves *v.* Hicks, 6 Sim. 398; and Coventry *v.* Coventry, 2 P. W. 222, 1 Stra. 596; Edwards *v.* Freeman, 2 P. W. 437; Lancy *v.* Duke of Athol, 2 Atk. 444; Lechmere *v.* Charlton, 15 Ves. 193; Loosemore *v.* Knapman, Kay 123.

(*g*) Jenkinson *v.* Harcourt, Kay 688; in this case the power was an absolute power over the whole estate, which makes it stronger, as more nearly approaching a mortgage by an owner in fee.

(*h*) Vandeleur *v.* Vandeleur, 9 Bli. (N. S.) 157, 3 Cl. & Fin. 82; Ibbetson *v.* Ibbetson, 12 Sim. 206; and see Lewis *v.* Nangle, 1 Cox 240; Alen *v.* Hogan, Ll. & Go. temp. Sugd. 231.

(*i*) Id.; Redington *v.* Redington, 1 Ba. & Be. 131; per Lord Eldon, Ex parte Digby, Jac. 235; Jameson *v.* Stein, 21 Beav. 5: in Vandeleur *v.* Vandeleur, the settlor paid off some of the charges, and declared such payment to be in ease of the estate, and the remainder only continued on the estate.

(*j*) Barham *v.* Earl of Clarendon, 10 Hare 126; the covenant need not, it is conceived, be an express covenant for payment of the charge, the ordinary covenants for title would have the same effect.

(*k*) See per Lord Redesdale, Noel *v.* Lord Henley, Dan. 331, 332; Lady Langdale *v.* Briggs, 8 D., M. & G. 391.

the fee simple in possession would not be held to change the order of liability. (*l*) In the converse case, namely, where a settlor with reversion in fee to himself covenants to discharge the settled estate from an encumbrance primarily charged thereon, and afterwards by failure of the limitations in his lifetime becomes again entitled to the inheritance, it seems less open to question that his personal liability ceases, since the money would be at home in the hands of the covenantor. (*m*)

Stat. 17 and 18 Vict., c. 113, making mortgage debts primarily chargeable on land.

By statute 17 and 18 Vict., c. 113, it was enacted, that "When any person shall, after the 31st of December, 1854, die seized of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will or deed or other document have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, (*n*) but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed or document already made or to be made before the 1st of January, 1855." [13]

(*l*) See Scott *v.* Beecher, 5 Mad. 96; Lord Ilchester *v.* Lord Carnarvon, 1 Beav. 209. But see per K. Bruce, V. C., 1 Y. & C. C. C. 711.

(*m*) Per Turner, V. C., Barham *v.* Earl of Clarendon, 10 Hare 133.

(*n*) *I. e.*, other than that so descended or devised, per Jessel, M. R., 9 Ch. D. 17.]

13. A similar statute has been enacted in New York, (1 R. S. 749, § 4); Mosely *v.* Marshall, 27 Barb. 42; Halsey *v.* Reed, 9 Paige 446; Johnson *v.* Corbett, 11 Id. 265; and has been held to apply notwithstanding a general direction to pay debts, Taylor *v.* Wendel, 4 Bradf. 324; but not where the direction is to pay "all debts on bond and mortgage," Rapalye *v.* Rapalye, 27 Barb. 620; nor where a debt is for purchase money unsecured by mort-

Includes copyholds.

Copyholds are within this act, (o) but the words "heir or devisee to whom such lands or hereditaments shall descend or be devised," had the effect of excluding leaseholds, (p) and a share of money to arise by sale of land previously settled on trust to sell, (q) although the preceding words "interest in lands or hereditaments" would have included them.

Equitable mortgage.

The act applies to an equitable mortgage by deposit of title deeds; (r) but it appeared doubtful whether the words "charged by way of mortgage" covered a charge under which foreclosure was not the remedy, *e. g.*, a conveyance on trust for sale. A vendor's lien for unpaid purchase money, though an encumbrance, (s) was clearly not within those words. (t) And land charged by will generally with debts and legacies, and so devised, is not, in the hands of the devisee, land charged with a sum by way of mortgage, within the act, unless and until the amount is ascertained and the devisee has "expressly taken the estate subject to such ascertained charge." (u)

Trust for sale.

Vendor's lien.

General charge of debts.

What words will exclude the statute.

The contrary or other intention required to exclude the operation of this act was held to be signified if a testator gave the residue of his real and personal estate, (x) or his personal estate, (y) upon trust for, or charged with, the payment of his debts, without express reference to mortgage debts.

But the stat. 30 and 31 Vict., c. 69, after reciting that doubts might

gage, Lamport *v.* Beeman, 34 Barb. 239; or for purchase money on contract to purchase not completed at testator's death, Johnson *v.* Corbett, *ubi supra.*

[(o) Piper *v.* Piper, 1 J. & H. 91.

(p) Solomon *v.* Solomon, 33 L. J., Ch. 473; Gall *v.* Fenwick, 43 L. J., Ch. 178; Hill *v.* Wormsley, 4 Ch. D. 665.

(q) Lewis *v.* Lewis, L. R., 13 Eq. 218.

(r) Pembrooke *v.* Friend, 1 J. & H. 132; Coleby *v.* Coleby, L. R., 2 Eq. 803 (though in terms as "collateral security" for money lent on promissory note); Davis *v.* Davis, W. N. 1876, p. 242. Foreclosure is the regular remedy under an equitable mortgage, whether the deposit is or is not accompanied by an agreement to execute a legal mortgage, Pryce *v.* Bury, L. R., 15 Eq. 153, n.

(s) Barnwell *v.* Iremonger, 1 Dr. & Sm. 255.

(t) Hood *v.* Hood, 26 L. J., Ch. 616.

(u) Hepworth *v.* Hill, 30 Beav. 476. The point here decided seems not to be touched by the subsequent acts.

(x) Stone *v.* Parker, 1 Dr. & Sm. 212; Allen *v.* Allen, 30 Beav. 395; Newman *v.* Wilson, 31 Beav. 33.

(y) Smith *v.* Smith, 3 Gif. 263; Mellish *v.* Vallins, 2 J. & H. 194; Eno *v.* Tatham, 3 D., J. & S. 451; Moore *v.* Moore, 1 D., J. & S. 602: overruling Rowson *v.* Harrison, 31 Beav. 207. But not by a mere direction that his debts should be paid as soon as might be, Pembrooke *v.* Friend, 1 J. & H. 132; Coote *v.* Lowndes, L. R., 10 Eq. 376; or should be paid out of his estate, Woolstencroft *v.* Woolstencroft, 2 D., F. & J. 347; Brownson *v.* Lawrance, L R., 6 Eq. 1.

exist upon the construction of the former act, and that it was desirable that such doubts should for the future be removed, enacts (§ 1) that in the construction of the will of any person dying after 31st December, 1867, "a general direction that the debts or that all the debts of the testator shall be paid out of his *personal* estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the *said act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate;" and (§ 2), that "in the construction of the said act and of this act the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase money upon any lands or hereditaments purchased by a *testator*."

Explanatory stat. 30 and 31 Vict., c. 69.

Vendor's lien.

"The meaning of Sect. 1 (said Sir G. Giffard, V. C.), though not so happily expressed as it might be, appears to be this, that if a testator wishes to give a direction which shall be deemed a declaration of an intention contrary to the rule laid down by L. King's act, it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakably to refer to or describe them." (*z*) And although the act speaks only of the insufficiency of a direction to pay debts out of *personal* estate, it has been decided that a direction to pay out of real estate, or out of real and personal estate, is also insufficient to exonerate the mortgaged property, unless mortgage debts are expressly or impliedly referred to. (*a*) It has also been held that such a reference cannot be implied from a direction to pay the debts "in aid of the personal and in exoneration of the real estate," (*b*) or simply "in exoneration of the real estate." (*c*)

What words exclude the statutes.

The word "testator" as used in Sect. 2 was another of the "unhappy" expressions occurring in these acts. Its effect was to exclude a lien for purchase money where the purchaser died intestate. (*d*) Moreover, this act omitted to provide for the case of leaseholds "unhappily" excluded from the first.

(*z*) Nelson *v.* Page, L. R., 7 Eq. 25.

(*a*) In re Newmarch, 9 Ch. D. 12; Gall *v.* Fenwick, 43 L. J., Ch. 178; In re Rossiter, 13 Ch. D. 355. See also Sackville *v.* Smyth, L. R., 17 Eq. 153, (better reported on this point 43 L. J., Ch. 494,) where however the will drew a distinction between encumbrances on real estate and other debts; and per Malins, V. C., Lewis *v.* Lewis, L. R., 13 Eq. 227. And see now 40 and 41 Vict., c. 34, stated *post*.

(*b*) In re Newmarch, 9 Ch. D. 12, *dub.* Baggallay, L. J.

(*c*) In re Rossiter, 13 Ch. D. 355.

(*d*) Harding *v.* Harding, L. R., 13 Eq. 493.

By yet another act, therefore, it is provided (*e*) that the former acts "shall, as to any testator or intestate dying after 31st December, 1877, be held to extend to a testator or intestate dying seized or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage or any other equitable charge, including any lien for unpaid purchase money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged *or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate."

Amending act 40 and 41 Vict., c. 34.

Includes leaseholds;

—any equitable charge.

Where the contrary intention is shown by the substitution of another fund, the question arises, is the act ousted altogether, so that exoneration may be claimed generally out of the other assets in the order appointed by the old law; or is the act excluded only to the extent of the substituted fund, so that if this proves insufficient the right to exoneration is exhausted and the burden comes back at once to the mortgaged land? In Allen *v.* Allen (*f*) Sir J. Romilly, without deciding the question, took pains to show that his opinion was in favor of the former view. But in Rodhouse *v.* Mold, (*g*) Sir R. Kindersley decided that the latter was the correct view; and, having regard to the course taken by recent decisions on the acts, this view seems likely to prevail; for if there was once a desire to give as little effect to them as possible, (*h*) those decisions show that the desire has now been removed, if not reversed.

The acts do not prescribe any particular means for signifying an intention to exclude the new rule. To ascertain whether such an intention is shown, the whole will (or other document) must, as in other cases, be taken into consideration; and herein the mode in which the mortgaged estate is disposed of is material. Limitations in strict set-

(*e*) 40 and 41 Vict., c. 34.

(*f*) 30 Beav. 403.

(*g*) 35 L. J., Ch. 67. If the terms used import simply and directly an intention to exonerate the mortgaged land, and do not merely leave that intention to be inferred from the substitution of another fund, there would seem to be less difficulty in holding the act to be wholly excluded.

(*h*) See per Jessel, M. R., Gall *v.* Fenwick, 43 L. J., Ch. 179.

tlement *per se* are inconclusive; (*i*) a trust for sale at a future time, with a detailed disposition of the proceeds after deducting costs (but not alluding to the mortgage) possesses more weight. (*k*)

How charge apportioned between the different parts of the land charged;

The first of the three acts directs that every part of the mortgaged hereditaments, according to its value, shall bear a proportionate part of the mortgage debts charged on the whole thereof; subject, however, with the other provisions of the act, to a contrary or other intention appearing by the will or deed or other document of the person creating the charge. (*l*) In *Brownson *v.* Lawrance, (*m*) it was held by Lord Romilly that the fact of the mortgagor having specifically devised part of the mortgaged estate, and left the other part to pass by a residuary devise, was of itself an expression of his intention that the part which passed by the residuary devise should be primarily liable to the whole debt. But it is difficult to maintain this since Hensman *v.* Fryer; (*n*) and in Sackville *v.* Smyth, (*o*) where the mortgagor devised all his real estate to A subject to a life estate in a specific portion, it was held by Sir G. Jessel, M. R., that the life estate was subject to a proportionate share of the burden, viz., to keep down the interest on the specifically devised portion. He did not agree with Brownson *v.* Lawrance. In Stringer *v.* Harper, (*p*) where a testator mortgaged estate A for £800, and on the same day created an equitable mortgage on estate B by way of further security to the extent of £200, and afterwards by a will dated in 1855 devised B specifically, but made no disposition of A; it was held by Sir J. Romilly, M. R., that the case depended on the construction of the two written instruments of even date, and not on the act; that A was primarily charged, and B only in aid, for part of the debt.

—where real and personal property are mortgaged together.

The acts do not expressly provide for the common case of a mortgage including both land and personal chattels. But it has been held that the debt must in such a case be apportioned between the land and the chattels as it would have been before the acts. (*q*) The words in the first act which make

(*i*) See per Wood, V. C., Pembrooke *v.* Friend, 1 J. & H. 134; Coote *v.* Lowndes, L. R., 10 Eq. 376.

(*k*) Eno *v.* Tatham, 3 D., J. & S. 443.

(*l*) On the construction of directions for apportionment of the charge between the different estates charged, see Woodward *v.* Woodward, 5 Jur. (N. S.) 1281.

(*m*) L. R., 6 Eq. 1.

(*n*) L. R., 3 Ch. 420, *ante* p. *623, n. (*t*).

(*o*) L. R., 17 Eq. 153, 43 L. J., Ch. 494, and see per Malins, V. C., Gibbins *v.* Eyden, L. R., 7 Eq. 375.

(*p*) 26 Beav. 33.

(*q*) Trestrail *v.* Mason, 7 Ch. D. 655; Leonino *v.* Leonino, 10 Ch. D. 460. See

the mortgaged *land* as between the different persons claiming through or under the deceased person primarily liable to *all* mortgage debts charged thereon, and which by themselves might seem to require exoneration of the chattels by the land, must, it should seem, on a fair interpretation, be controlled by the preceding clause, which defeats the old right of the heir or devisee to exoneration, and which is the governing clause.

Acts apply in favor of the crown, where no next of kin.

Considering that the clause last referred to was the substantial *part of the enactment, Sir R. Kindersley held that, notwithstanding the words "as between the persons claiming *through or under* the deceased," the act applied in favor of the crown taking the personalty for want of next of kin. (*r*)

To what cases the second proviso in the first act applies.

The concluding proviso of the first act declares that nothing contained in the act shall affect the rights of persons claiming under any will, deed or document made before 1st January, 1855. The new rule therefore cannot apply to any case where a testator dying after 1854 has by will dated before 1855 disposed of the mortgaged property specifically or has made a general residuary devise of his real estate. And a will made before 1855 is not the less within the proviso for having been republished by codicil dated since 1854. (*s*) But the new rule does apply as against the heir if the mortgagor dies intestate, although the property was purchased and mortgaged by the latter before 1855; for on the true construction of the act the heir claims immediately by descent, and not under the deed of conveyance. (*t*) The new rule has also been held to apply, as against the heir, to the case of a testator dying after 1854 and having by will made before 1855 made a general residuary bequest of his personal estate, but died intestate as to his mortgaged estate, although the rights of the residuary legatee were

also Lipscomb *v.* Lipscomb, L. R., 7 Eq. 501; Evans *v.* Wyatt, 31 Beav. 217; Gall *v.* Fenwick, 43 L. J., Ch. 178; the last two being cases of freeholds and leaseholds before the latter were brought within the acts. In Lipscomb *v.* Lipscomb, and Leonino *v.* Leonino, there was also a question whether on the construction of the mortgages themselves the several mortgaged properties were made liable in any particular order. And see *ante* p. *626, n. (*n*).

(*r*) Dacre *v.* Patrickson, 1 Dr. & Sm. 186.

(*s*) Rolfe *v.* Perry, 3 D., J. & S. 481.

(*t*) Piper *v.* Piper, 1 J. & H. 91; what was the precise meaning of "deed or document" in this proviso was not thought an easy question. See also Nelson *v.* Page, L. R., 7 Eq. 25, where the mortgaged estate was purchased in 1842, and had not *lapsed*, as would appear by the head-note, since the will was made in 1835.

thus "affected" by the act. "Affect," it was said, must mean prejudicially affect; otherwise the proviso would defeat the plain object of the legislature. (u) But *prima facie* "affect" is neutral, (x) and it does not seem that in this particular proviso the object of the legislature is so very plain.

Statutes do not apply to Scotland;

There is no corresponding proviso in either of the amending or explanatory acts. Scotland is excepted from all. And the new rule does not apply to chattels personal, which therefore, if pledged or mortgaged by the testator, must still be redeemed for a specific legatee at the expense of the general personal estate. (y) The law therefore is certainly not simplified.]

—nor to personal chattels.

What will exempt personal estate.

III.—The next subject of inquiry is as to what will exempt the general personal estate from its primary liability to debts *and other charges, for which the testator has provided another fund; in other words, what demonstrates an intention that such primary liability shall be transferred to the fund in question; a point which, it will be seen, has been a prolific source of litigation. [14]

(u) Power v. Power, 8 Ir. Ch. Rep. 340.

(x) See *ante* vol. I., p. *41, n. (t).

(y) Lewis v. Lewis, L. R., 13 Eq. 218.]

14. Personal property may be exonerated from liability for debts by any language making such intention plainly appear, Marsh v. Marsh, 10 B. Mon. 361; Seaver v. Lewis, 14 Mass. 83; Hancock v. Minot, 8 Pick. 37; Bane v. Wick, 14 Ohio St. 505; Walker's Estate, 3 Rawle 241; Lightfoot v. Lightfoot, 27 Ala. 351; Broadwell v. Broadwell, 4 Metc. (Ky.) 290; Ruston v. Ruston, 2 Yea. 63; Scott v. Morrison, 5 Ind. 551; Estate of Woodworth, 31 Cal. 595; Dunlap v. Dunlap, 4 Desaus. 305, 329.

"It is only necessary that, from the whole testamentary disposition taken together, there should appear on the part of the testator an intention so expressed as to convince a *judicial* mind that it was meant to charge the real estate so as to exempt the personal, or to make them both abate and contribute ratably," Wagner, J., in Brant's Will, 40 Mo. 266, 279.

Where the personalty is given by a nuncupative will, and there is sufficient real estate to pay the debts, this will be taken as an intention to exonerate the personalty from payment of debts, McCullom v. Chidester, 67 Ill. 477.

In this case, at page 479, it was said by Thornton, J.: "What, then, was the effect of the will? Did it bequeath the personal property to Rowena, subject to the payment of debts? Does the law authorize a nuncupative will only that the promise, which affords hope and expectation, may be suddenly blighted? Under such construction, one, *in extremis*, could not bequeath a valued memento to a much loved friend, though he might have millions with which to pay his debts.

"We have been referred to no authority bearing upon the question under discussion, and, after a diligent examination, have been enabled to find none.

"It is a universal maxim that the de-

That the making a provision for debts or legacies out of the real estate does not discharge the personalty, is implied in the very terms of this question. There must be an intention not only to onerate the realty, but to exonerate the person-

Addition of another fund does not.

sign and intent of the framers of the law shall prevail. It is our duty to ascertain the object and meaning of the statute, from the act itself and from other acts *in pari materia*. The interpretation should never lead to an absurdity nor defeat the object of the law.

"Ordinarily the personal property of a deceased is the primary fund for the payment of debts; but, unless in this particular case the provisions of the statute are to be regarded as having modified the rule, then the statute as to *nuncupative* wills will often be inoperative, though the deceased may leave property sufficient to fulfil his will as well as to satisfy his creditors.

"Here is real estate of the value of ten times the amount of the debts, chargeable with no legacy, unencumbered and liable to be converted into money by the most summary proceedings. The creditors are in no danger of loss, or even of delay, by compelling them to rely upon the sale of the realty, for the money can be realized by a sale of it almost as readily as by the sale of the personalty. On the other hand, grant to the creditors the right first to resort to the personalty, and the devisee is deprived of all benefit under the will, and the intention of the testator is entirely frustrated. A rule of law which has no application, by reason of the facts, should not operate such marked injustice. In the one view, the intention of the testator and the object of the statute may both be preserved, and the creditors fully satisfied without expense or unreasonable delay. In the other view, without being necessary for the protection of creditors, the devisee is deprived of her bequest, given by authority of law, and the will is disregarded.

"Courts should never be driven to a construction which leads to an absurdity, confounds the law and thwarts the intention.

"What is the object of the statute? Its own language affords the answer: 'A nuncupative will shall be good and available in law for the conveyance of personal property thereby bequeathed.' It transfers the property from one use to another. What was the intention of the testator? It was to give his personal property to the devisee. We know, then, the purpose of the law and the design of the giver. They must be effected if consistent with the rules of law. No principle of law is violated, in this case, by strict fulfilment of the object and intent, for ample provision exists for all."

The direction in a will that the executor, out of the testator's estate, pay off all his just debts and funeral expenses, may be taken to be evidence that the testator intended that the personalty—the fund at the executor's disposal—should be first used for the payment of debts, Hull *v.* Hull, 3 Rich. Eq. 65.

It has been held that where the object for which a fund is exonerated fails, the exoneration itself ceases, Hawley *v.* James, 5 Paige 318.

Where there is no real estate, and one-half of the personalty is specifically bequeathed, it is not exonerated from its share of the debts of the estate, Briggs *v.* Hosford, 22 Pick. 288.

Where all testator's property is charged with his debts, the personal property is primarily liable, Garnett *v.* Macon, 1 Brock. C. C. 185; West *v.* Williams, 15 Ark. 682; Adams *v.* Bracket, 5 Metc. 280; Whitehead *v.* Gibbons, 2 Stockt. 230; Gridley *v.* Gridley, 33 Barb. 254.

alty; not merely to supply another fund, but to substitute that fund for the property antecedently liable.

Thus in numerous cases it has been held that neither a charge of

So where it is a legacy that is charged, Leavitt *v.* Wooster, 14 N. H. 550.

Where a devisee of land is directed to pay debts and legacies, and the land is limited over after his death to his children, and no disposition is made by the testator of his personal property, there is no exoneration of the personalty, and it remains first liable, Marsh *v.* Marsh, 10 B. Mon. 361. So where the disposition of the personal property is only partial, *e. g.*, for life, Hoes *v.* Van Hoesen, 1 N. Y. 120. So a charge of debts on the real property is no exoneration of the personalty, Chapin *v.* Waters, 116 Mass. 146; Lee, Appellant, 18 Pick. 288; Sims *v.* Sims, 2 Stockt. 161; Kelsey *v.* Western, 2 N. Y. 500; Livingston *v.* Newkirk, 3 Johns. Ch. 312; Tole *v.* Hardy, 6 Cow. 333; Rogers *v.* Rogers, 1 Paige 188, affirmed 3 Wend. 518; Hawley *v.* James, 5 Paige 449, affirmed 16 Wend. 61; Hanna's Appeal, 31 Penna. St. 53; Riley's Appeal, 34 Id. 291; Gallagher's Appeal, 48 Id. 121; Brisben's Appeal, 70 Id. 405; Davis' Appeal, 83 Id. 348; Miller *v.* Harwell, 3 Murph. (N. C.) 194; especially if the charge is of such debts as should be outstanding at the death of the life tenant, Brown *v.* Brown, 41 N. Y. 515.

Where land is charged with payment of legacies, and sufficient personalty has been received by the executors and wasted, the land is discharged thereby, Hanna's Appeal, 31 Penna. St. 53.

But a direction that a devisee pay a certain legacy within a year, has been held to exonerate the personalty, Salisbury *v.* Morse, 7 Lans. 359. So a devise "subject to the payment" of a certain debt, which was not the testator's own debt, Smith *v.* Wyckoff, 11 Paige 49; or "on condition that he pay" debts, followed by other disposition of the personalty, McFait's Appeal, 8 Penna. St. 290; so where the real estate is devised to the wife for life, and certain legacies are given "to be paid after her death," and the residue of the personal property is given to her, the "residue" was construed to mean after payment of debts and funeral expenses, and the personalty was held to be exonerated from the legacies, Clery's Appeal, 35 Penna. St. 54.

Where land is charged generally with payment of debts, and all the personal property is specifically bequeathed, this amounts to an exoneration of the personal property until the land descended and so charged is exhausted, Lightfoot *v.* Lightfoot, 27 Ala. 351; Lee, Appellant, 18 Pick. 288; Larkin *v.* Mann, 53 Barb. 267; Carter *v.* Balfour, 19 Ala. 830; Spraker *v.* Van Alstyne, 18 Wend. 200, reversing 13 Id. 582; Scott *v.* Morrison, 5 Ind. 551; Dunlap *v.* Dunlap, 4 Desaus. 305; Cornish *v.* Willson, 6 Gill 299, 317.

As to the liability of descended lands in exoneration of personalty, it was said by Ruffin, J.: "Descended lands must pay all debts for which the real estate is liable, in exoneration of all but residuary legacies, or of other lands specifically devised for the payment of debts. And if the creditors go upon the personalty, the legatees may have an indemnity out of the realty. This is an old rule of the Court of Chancery. (Ch. Ca. 2, pl. 4.) It is founded on this: that a man who is able to pay all his debts, and has something over to give away, may give it as he chooses. He cannot indeed restrain the creditor from resorting to any fund made liable to him by law. But if the creditor will, through mere caprice or convenience, go upon that fund which the testator meant for a particular donee, instead of that other left open alike by the law and the testator for his satisfaction, the donee shall be reimbursed out of the latter. And as to

Mere charge on land does not exonerate personalty.

debts on the testator's lands generally, or on a specific portion of them, (z) nor a devise upon trust for sale, however formally or anxiously framed, (a) nor the creation of

debts due by specialty in which the heir is bound, this principle has been extended to the protection of pecuniary legatees—much more specific legatees. (Hanby v. Roberts, Amb. 127; Gallon v. Hancock, 2 Atk. 430; Aldrich v. Cooper, 8 Ves. 396.) If therefore the heir be made to pay such a debt, he may reinstate himself out of the executor, if there be a residue; because both at law and in this court, that is liable before land; but if there be no residue, but only things given away in legacies, he cannot, but must rest under the burden. *E converso*, if such legacies be applied to the discharge of such a debt, the legatee shall be reinstated by standing in the place of the satisfied creditor. (Hanby v. Roberts.) It follows that in no case in England can the legatee be reimbursed out of the land for a simple contract debt, paid out of his legacy; for the heir was not liable for that to the creditor, to whose rights and remedies only is the legatee substituted. It is the same here; because simple contract creditors can have recourse to the land only after exhausting the personalty, and therefore the legatee cannot ask the land to replace that personalty—which would be an absurdity, as was held in Miller v. Johnson, (3 Murph. 194,)" Robards v. Wortham, 2 Dev. Eq. 173, 175.

So where there is a devise and bequest of real and personal property, "except so much thereof as will pay my just debts which I think may be done by the growing crop," other legatees are exonerated, Hines v. Spruil, 2 Dev. & Bat. Eq. 101. See also Estate of Woodworth, 31 Cal. 595.

In Scott v. Morrison, 5 Ind. 551, 553, Perkins, J., says: "But it is urged that personal property devised will be exonerated till undevised real estate shall be applied to the payment of debts. Undevised real estate would be sold to discharge indebtedness before looking to such estate devised. Such was our statute. R. S. 1843, p. 488, § 20. But it is decided in numerous cases that the mere fact that the personal property is devised generally to one person and the real estate to another, even where the real estate is expressly charged by the will with the payment of debts, will not exonerate the personal estate; though a specific bequest of particular articles of personal property would, in such case, exonerate them. Nor will a general bequest of personal property exempt it from the payment of debts, at the expense of undevised real estate, though a specific bequest would have that effect."

Not only is a devisee accepting a devise charged with a legacy personally liable for its payment, but the land devised is liable for debts before the legacy so charged, Hoover v. Hoover, 5 Penna. St. 351. So, too, where the charge is contingent on deficiency of personal estate, Field's Appeal, 36 Penna. St. 11.

A devisee accepting a devise of land charged with debts, becomes personally liable, and primarily so in exoneration of the land in hands of his grantee, Elwood v. Dieffendorf, 5 Barb. 398.

(z) White v. White, 2 Vern. 43; [French v. Chichester, Id. 568]; Bridgman v. Dove, 3 Atk. 201; [Walker v. Hardwick, 1 My. & K. 396; Ouseley v. Anstruther, 10 Beav. 453; Quennell v. Turner, 13 Id. 240.]

(a) Lord Inchiquin v. French, 1 Cox 1, 1 Wils. 82, Amb. 33; [Samwell v. Wake, 1 B. C. C. 144]; Hancox v. Abbey, 11 Ves. 186; [Collis v. Robins, 1 De G. & S. 131.]

a term of years for the purpose of such charge, (*b*) will exonerate the personalty.

Nor is it material that the charge is imposed on the devisee in the terms of a condition, as where real estate is devised to A, he paying the debts and legacies. (*c*)

History of the implication doctrine.

In order to exonerate the personal estate, the very early cases required express words; (*d*) but this rule was subsequently relaxed, not only by the admission of implication, but that implication was held to be raised by circumstances of a very slight and equivocal character, affording little more than conjecture. (*e*) Judges of a later period, however, feeling the evils to which this latitude of interpretation had given rise, and proceeding upon sounder principles of construction, have, without rejecting implication, required that it should be supported by such evidence, collected from the will, as ought fairly to satisfy a judicial mind of the testator's intention. A wish has been sometimes intimated that the old rule had been restored, but this was impracticable in the state of the authorities, and perhaps would have been hardly consistent with right principles of construction, for it is difficult to perceive any solid ground for excluding im*plication in this more than in any other species of case. The evil seems to have consisted in the extreme laxity with which the implication doctrine was at one period applied, which tended in effect to subvert altogether the rule establishing the primary liability of the personal estate; but this has been so far corrected by later adjudications, as greatly to diminish the uncertainty which the

Lands devised to an executor, A, charged with the payment of a legacy, are not discharged by payment by A to his co-executor, B, who failed to distribute. B's estate was held to be primarily liable —then the lands charged—but not lands devised by the testator to B and conveyed by him to a *bona fide* purchaser, Jenkins *v.* Freyer, 4 Paige 47.

It seems that if a testator provides that his debts and legacies be paid out of a particular property, or a particular fund, such property or fund, although it be real estate, or the income derived from real estate, must be first used for that purpose, even in exoneration of residuary or intestate personal property, Pinckney *v.* Pinckney, 2 Rich. Eq. 218; Ford *v.* Gaithur, Id. 270; Pell *v.* Ball, Speers Eq. 518.

Lands charged with the payment of debts may be reached by bill in equity, Helm *v.* Darby, 3 Dana 186; Berg *v.* Radcliff, 6 Johns. Ch. 302.

(*b*) Tower *v.* Lord Rous, 18 Ves. 132.

(*c*) Bridgman *v.* Dove, 3 Atk. 201; Mead *v.* Hide, 2 Vern. 120; Watson *v.* Brickwood, 9 Ves. 447; [but see Lockhart *v.* Hardy, 9 Beav. 397, *ante* p. *635.]

(*d*) Fereyes *v.* Robinson, Bunb. 301.

(*e*) Adams *v.* Meyrick, 1 Eq. Cas. Ab. 271, as to which, see 2 Atk. 626; 3 Ves. 110; Walker *v.* Jackson, 2 Atk. 624, and the other cases referred to *post*.

numerous cases occurring on the subject indicate to have prevailed half a century ago. (*f*) From the nature of the question, however, which is ever presenting itself under new combinations of circumstances, it is even now often attended with no little perplexity.

Rule now established.

It is well settled that the intent is to be collected from the whole will, (*g*) and must appear by "evident demonstration," "plain intention," or "necessary implication;" [15] though it must be confessed, that such propositions rather change the terms than afford a solution of the question; for, upon being told that the implication must be necessary, or must amount to evident demonstration, we are inevitably led to inquire what in judicial construction has been held to constitute such "necessary implication," or "evident demonstration;" the answer to which must be an appeal to the cases.

Parol evidence inadmissible.

It has also long been established, in opposition to some early decisions, (*h*) that in order to exonerate the personalty parol evidence is not admissible, (*i*) and that no inference of intention can be drawn from the relative amount of the personal estate and debts, or of the personal and real estate; (*k*) for the fact that the

[(*f*) This was written in 1827, 2 Powell Dev. by Jarm., p. 683.]

(*g*) Though this has been frequently stated as a rule peculiarly applicable to particular classes of cases, yet the student should be reminded that it is not confined to *any* class of cases, for it would not be possible to specify any point of testamentary construction which is excluded from its operation; nor is it of novel or recent introduction, for the old authorities never denied the effect of the context to express a particular intention, or control particular expressions. One cannot help, therefore, feeling some surprise that Lord Eldon should treat the applicability of this rule to the cases under consideration as a discovery of Sir W. Grant. "We have," said his lordship, in Gittins *v.* Steele, 1 Sw. 28, "now reached the sound rule, that for the purpose of collecting the intention every part of the will must be considered. That rule was first established by the great judge whom we have just lost, the late Master of the Rolls."

15. Barker's Appeal, 72 Penna. St. 421; Jackson *v.* Hoover, 26 Ind. 511; Lytle *v.* Beveridge, 58 N. Y. 592; Davis *v.* Hayden, 9 Mass. 514; Tappan *v.* Deblois, 45 Me. 122; Hall *v.* Chaffee, 14 N. H. 215; Gillis *v.* Harris, 6 Jones Eq. 267; Parker *v.* Wasley, 9 Gratt. 477; Johnson *v.* M. E. Church, 4 Iowa 180; Provost *v.* Provost, 12 C. E. Gr. (N. J.) 296; Heyward *v.* Brailsford, 2 Bay (S. C.) 255; Bell *v.* Hogan, 1 Stew. (Ala.) 536; Armorer *v.* Case, 9 La. Ann. 288; Robards *v.* Wortham, 2 Dev. Eq. 173. See also *ante* vol. I., p. 33, note 7, and other cases there cited.

(*h*) Gainsborough *v.* Gainsborough, 2 Vern. 252. [In Granville *v.* Beaufort, Id. 648, the evidence was admitted only to rebut an equitable presumption, which was allowable, see *ante* vol. I., p. *416.]

(*i*) Inchiquin *v.* French, 1 Cox 1, 1 Wils. 82, Amb. 33; Stephenson *v.* Heathcote, 1 Ed. 39.

(*k*) Cro. El. 205; Cowp. 833; 1 Cox 9; 2 B. C. C. 273, 297; 2 Ves., Jr., 593; 3 Ves. 299; [1 Ed. 43]; 1 Ba. & Be. 315, 542; 1 Mer. 222, which overruled Pre.

charges will exhaust the whole subject matter of the residuary bequest does not vary the construction.[16]

*This was decided in Tait *v.* Lord Northwick, (*l*) which is a leading authority on the general doctrine. The testator appointed certain estates to trustees, upon trust by sale or mortgage thereof or by sale of timber thereon *to pay his debts*, and directed the trustees to convey the lands not so applied to certain uses. He gave £100 to each of his trustees, and all the residue of his personal estate whatsoever between his two sisters, and appointed two of the trustees executors. Lord Loughborough held that the personal estate was first to be applied, as far as it would go, to pay the debts.

Relative amount of debts and personalty not to be considered.

But in Gray *v.* Minnethorpe, (*m*) the same judge thought that where the purchase money of an estate, devised in trust to be sold to pay debts and certain pecuniary legacies, was inadequate to pay the debts alone, this circumstance furnished an argument *against* exempting the personal estate. Such an argument, however, seems to be obnoxious to the reasoning which applies against making the amount of the personal estate a ground *for* the exemption; since the adequacy of the fund to pay debts must depend upon the amount of those debts at the death of the testator, and their amount at that period can afford no indication of his intention when he made his will.

It is clear that the charging the land with (in addition to debts) *funeral* or *testamentary* expenses or both, will not *per se* exempt the personalty; for although it seems improbable that the testator should mean to create an *auxiliary* fund to answer expenses which are payable out of the personal estate in priority to all other claims, and which it could hardly be insufficient to liquidate, yet such an argument amounts only to conjecture, and falls short of that necessary implication which is now held to be requisite to transfer the primary *onus* to the new fund.

Mere extension of the charge to funeral and testamentary expenses not sufficient.

Many opinions have been expressed on this point. Thus Lord Hardwicke in Walker *v.* Jackson (*n*) remarked that the words "debts, legacies and funeral expenses" were only words of style, an observation in which Sir W. Grant in

As to funeral expenses, &c., being included.

Ch. 101; Cas. temp. Talb. 202; 1 B. C. C. 457, n.

16. As to this point, see *ante* ch. XIII., and cases cited in the several notes to that chapter.

(*l*) 4 Ves. 816.

(*m*) 3 Ves. 103.

(*n*) 2 Atk. 624.

Brydges *v.* Phillips (*o*) seems to have concurred. The circumstance of funeral expenses being included in the charge was also disregarded by Lord Northington in Stephenson *v.* Heathcote, (*p*) and by Lord Kenyon in Williams *v.* Bishop of Llandaff, (*q*) (though the latter *judge decided in favor of the exemption, on grounds perhaps not less equivocal), and by Lord Manners in Aldridge *v.* Wallscourt. (*r*) On the other hand, Sir R. P. Arden, in Burton *v.* Knowlton, (*s*) thought a direction to pay funeral expenses a strong circumstance in favor of the exemption where the trustees of the fund, on whom the direction was imposed, were not the executors, to whose duty it naturally belonged. This case, however, has been commented upon both by Lord Loughborough (*t*) and Lord Eldon (*u*) in terms which throw great doubt upon its authority; and, if it rest on this ground (and it is difficult to find one more solid), the decision is clearly overruled by the cases already referred to and those which remain to be stated.

Thus, in Gray *v.* Minnethorpe, (*x*) where the testator devised certain lands to W. and J. and their heirs, in trust to sell, and out of the moneys arising therefrom to pay all his just debts and *funeral expenses*, and the residue over, and appointed his brother G. sole executor; Lord Loughborough held that the executor did not take the personal estate exempt from debts.

So, in Hartley *v.* Hurle, (*y*) where the testator directed that all his just debts *and funeral and testamentary expenses* be in the first place fully paid and satisfied, and then, after making a certain bequest, devised all his lands and hereditaments and moneys in the funds to A and B, upon trust out of the rents of his lands and the dividends of his moneys to pay all his *just debts*, FUNERAL AND TESTAMENTARY EXPENSES, *and certain legacies*, (*z*) and the residue over. After other bequests, the testator devised and bequeathed all the residue of his real and personal estate not by him otherwise given and disposed of to C. his daughter, and he appointed A, B and C executors. Sir R. P. Arden, M. R., held that the residuary personal estate was not exempt from the payment of debts.

(*o*) 6 Ves. 570.
(*p*) 1 Ed. 38.
(*q*) 1 Cox 254.
(*r*) 1 Ba. & Be. 312; *post* p. *662.
(*s*) 3 Ves. 108.
(*t*) See Tait *v.* Lord Northwick, 4 Ves. 823.
(*u*) Bootle *v.* Blundell, 1 Mer. 229.
(*x*) 3 Ves. 103.
(*y*) 5 Ves. 540.
(*z*) The legacies were held to be payable out of the real estate *only*, see *post*

The M. R. distinguished this case from Burton *v.* Knowlton, (*a*) on the ground of the general introductory words, which he said were a direction to *the executors* to pay the debts, &c., and therefore favored the non-exemption; (*b*) but we have seen that a direction in such terms, followed by the appropriation of a par*ticular fund for the purpose, has reference to the provision so made. (*c*) Such a distinction is clearly untenable.

Remark on Hartley *v.* Hurle.

So, in M'Leland *v.* Shaw, (*d*) where a testatrix devised certain lands to trustees to sell, and out of the money arising from such sale "in the first place" desired her FUNERAL EXPENSES *and the debts which she should owe at her death to be paid;* secondly, she directed the payment of several sums to persons who were creditors of her late husband. She then gave several legacies, including one to her executors for their trouble, adding, "the said several sums to be paid by my said executors and trustees out of the money arising from the sale of my said lands, which I do order to be sold with all convenient speed after my decease, and such of the said purchase money as shall remain after paying the said legacies, and the execution of this my will, I bequeath in the following manner." The testatrix then disposed of such residue. There was no disposition of the personal estate, otherwise than by the appointment of executors, who, having legacies for their trouble, could not take beneficially. (*e*) The next of kin claimed to take it exempt from debts, legacies and funeral expenses; but Lord Redesdale held that there were not sufficient words to raise an implication of intent to exempt the personalty from these charges. He thought, however, that the sums to be paid to the creditors of the husband were to be satisfied out of the real estate *only.* (*f*)

Personalty held not exempt, though charge extended to funeral expenses.

It is not denied, indeed, that the subjecting of the real estate to *all* the charges which belong to the personalty, as legacies, funeral and testamentary expenses, favors the supposition that the personalty is intended to be given as a specific legacy, and consequently to be exempt; (*g*) but no case which rests on this simple circumstance is now to be relied on. Such

Trust to pay legacies, funeral and testamentary expenses.

(*a*) 3 Ves. 107. See *post.*
(*b*) See an observation upon this, *supra.*
(*c*) *Ante* p. *591.
(*d*) 2 Sch. & L. 538.
(*e*) But now see 1 Will. IV., c. 40.
(*f*) As to this, see cases cited *post.*
(*g*) See Sir W. Grant's judgment in Tower *v.* Lord Rous, 18 Ves. 139. Also Greene *v.* Greene, 4 Mad. 148; Michell *v.* Michell, 5 Mad. 69; Driver *v.* Ferrand, 1 R. & My. 681.

seems to be the situation of Gaskell *v.* Gough, cited by Sir R. P. Arden in Burton *v.* Knowlton, (*h*) which, however, is too loosely stated to enable us to form a satisfactory opinion of the grounds of it. It does not appear who was the executor, or in what terms the personalty was given.

Effect of testamentary charges being thrown on real estate.

In the much considered case of Bootle *v.* Blundell, (*i*) the extension of the charge to funeral and testamentary expenses seems *to have been treated by Lord Eldon as having much weight, though it was there aided by the circumstance that some particular charges incident to the administration of the estate, namely, that of supporting the will against any attempt to invalidate it, was, by a codicil, imposed *exclusively* on the real estate. "On looking through the precedents," said his lordship, "it is impossible to deny that this is a circumstance on which great stress has always been laid, namely, where the real estate is made liable to such expenses as exclusively regard the administration of the personal estate, such as the costs of probate, and other costs sustained in the execution of the will."

Where personalty is *expressly* subjected to *other* charges.

It has been decided that the *expressly* subjecting the personal estate to certain charges, to which it was before liable, does not, by force of the principle *expressio unius est exclusio alterius*, raise a necessary implication that it is not to bear other charges *not* so expressly directed to be payable out of it, but which are thrown upon the land.

Thus, in Brydges *v.* Phillips, (*k*) where the testator devised certain real estate upon trust for sale, and out of the money arising thereby *to pay his debts* and certain legacies, and devised over the lands which should remain unsold. The testator then gave certain other legacies, *and directed the last-mentioned legacies to be paid out of his* PERSONAL *estate*, and bequeathed the residue of his said personal estate, except as aforesaid, to his wife, whom, with two other persons, he appointed his executrix and executors: Sir W. Grant, M. R., held that though there was room for conjecture that the testator did mean to throw his debts primarily upon the real estate, yet that this did not appear with a sufficient degree of certainty to enable him judicially to collect such an

(*h*) 3 Ves. 111. See also Kynaston *v.* Kynaston, 1 B. C. C. 457, n., *post* p. *662, n.

(*i*) 1 Mer. 193.

(*k*) 6 Ves. 567; [and see Davies *v.* Ashford, 15 Sim. 42.]

intention. He said that by directing the legacies to be paid out of the personal estate, the testator might merely have intended to distinguish those legacies from the others which were to be paid out of the real estate. His Honor also adverted to the circumstance that the trustees and executors were not wholly the same persons.

Provision as to the manner in which the charge on the realty is to be borne.

This principle, too, was strongly recognized by the same judge in Watson *v.* Brickwood, (*l*) which also establishes that an intimation, however anxiously made, as to the proportions and mode in which the charge is to be borne among the devisees of the real *estate, will not have the effect of onerating it primarily; such a clause being considered only as providing for the event, *in case the land does become chargeable*, and not charging it at all events.(*m*) The case was as follows:—

Watson v. Brickwood.

A testator devised all his freehold lands to the use of his nephews W. and R. and their sons successively in strict settlement, with remainder to G. for life, and such son as he should by will appoint, with remainder to N. and his first and other sons in tail male; he then gave to several nieces legacies in blank, and proceeded thus: "And I direct the same legacies to be paid at the end of twelve months next after my decease by my executor hereinafter named. I give and bequeath all and singular *my goods, chattels, personal estate and effects whatsoever and wheresoever, not hereinbefore disposed of*, unto my said nephew W., his executors, administrators and assigns forever, he paying thereout all and singular legacies, *and all my funeral expenses and* SIMPLE CONTRACT *debts*. And whereas I have at different times borrowed on mortgage and bond divers sums of money of different persons, to enable me to make purchases of part of the said estates hereinbefore limited; and being minded that the whole should be discharged in equal proportions by the said W., R., G., and such his son so to be appointed as aforesaid, as they respectively shall become entitled to the possession of my said estates: Now I hereby will, order and direct, that all such sum or sums of money as the said W., R., G., or his son

Personalty held not to be exempt though land charged.

(*l*) 9 Ves. 447; [and see 1 Jo. & Lat. 363.]

(*m*) But see Anderton *v.* Cooke, cit. 1 B. C. C. 456; Williams *v.* Bishop of Llandaff, 1 Cox 254, where an estate was charged *in case another estate devised upon trust to pay debts should be insufficient;* and the personal estate was held to be exempt. Such a case seems to fall directly within the principle stated in the text. It does not appear, however, whether the decisions rested on the words in question. See another case of this kind, Dawes *v.* Scott, 5 Russ. 32, *post* p. *669.

so to be appointed as hereinbefore mentioned, or the said N. shall pay off and discharge during the time each of them shall be in possession of my said estates under this my will, and also all such sum or sums of money as any of them shall expend, or be put to in the Court of Chancery, or elsewhere, in protecting or defending my said leasehold estate, and a due proportion of any of the two last fines, to be paid from time to time for the renewal of the leases thereof, shall be a debt and charge against the whole of such estates in favor of the person or persons, his and their executors, administrators and assigns, so paying off and discharging such sum or sums, for so much money as shall be actually so paid and expended; and I direct the next taker of all my said estates under this my will to repay such *sum and sums of money as his predecessor from time to time shall have so paid off and expended to such person or persons, and in such manner, as his predecessor shall direct by any deed or will, to be by him duly executed, and for want thereof to the executor or administrator of such predecessor, from time to time, deducting, from time to time, the due share or proportion thereof of such preceding taker, until the whole of such sum or sums of money shall be paid off; and I direct the same course to be used by each of the takers in succession until the full payment thereof, before such next taker or takers can have any benefit under this my will: it being my will and desire, that no part of my estates be sold or parted with, and that all possible care be taken and observed in regard to such leasehold estates, as well with respect to the renewal of leases, from time to time, as with respect to any dispute that may at any time hereafter arise in consequence thereof." *And the testator appointed W. his executor.* By a codicil, reciting the disposition of his estates to T. (the trustee), he gave the same to J., revoked the former devise, and gave to J. the powers and authorities given by the will to T.; and he further willed that J. and his heirs should and might, in order to raise money *for the payment of all and singular his debts and legacies*, from time to time, *mortgage*, with the approbation of the taker for the time being of the said estates, according to his said will, a competent part of *his said freehold estates* for so much money as should be necessary for the purpose, and he directed his trustees for the time being to keep down the interest. By another codicil, the testator appointed another trustee, and gave other legacies. It was contended that the personal estate was discharged from the debts, or at least subject only to the *simple contract* debts: but Sir W.

Sir W. Grant's judgment in Watson v. Brickwood.

Grant was of a different opinion. He admitted that there was some indication of an intention to exonerate the personalty; but thought *that it was not so conclusive as to come up to the requisition of the rule laid down by Lord Thurlow, in Duke of Ancaster* v. *Mayer*, (n) *that is, a plain intention;* and that by directing the executor, to whom he gave all his personal estate, to pay thereout all the legacies, funeral expenses and simple contract debts, *prima facie* there was some appearance of an intention that he did not mean the personal estate to be liable to debts *by specialty*, but that alone upon the authorities *was not sufficient; there must be a charge clearly and distinctly upon the real estate (o) to make it liable. When he declared his intention as to the real estate, it did not appear he had any fixed and distinct resolution by any act of his own to throw the specialty debts on the real estate; but he seemed to suppose either that the personal estate would not be sufficient both for the simple contract and specialty debts, or that the latter would of course fall upon the real estate, and any act by him to throw them upon the real estate was not necessary; for he had not in direct terms made any charge upon the real estate, but he took it for granted that the real estate would be called upon for bond debts and mortgages, and his object was to secure an equal distribution of the burden among the devisees, who were to take the real estate in succession, and no other object whatsoever. His intention was not to favor the executor taking the personal estate against those taking the real estate, *but to take care that those who were to take the real estate as against each other should bear the burden in equal proportions.* It was contended, his Honor said, that the codicil operated as a total exoneration both from debts and legacies; the codicil contained as complete a provision for all debts and legacies as could be; but that was nothing more than there was in Tait *v.* Northwick. (p) This case was hardly so strong in that respect, for in that case there were more circumstances from which it might have been argued that the testator could not have had it in contemplation to burden his real estate merely in aid of the personal. At most this was but the same case, and could not be contended higher than as equivalent to that; and there Lord Rosslyn, adhering to Lord Thurlow's rule, said expressly that the most anxious provision for payment of debts

(n) 1 B. C. C. 454. This case was decided by Lord Thurlow principally upon another point, (see *ante*,) but the positions laid down by him on the doctrine in discussion have been much referred to.

(o) And that *only*. See the sequel of the judgment.

(p) 4 Ves. 816; *ante* p. *654.

out of the real estate would not be sufficient to exonerate the personal estate. His Honor was therefore of opinion that there was no exoneration of the personal estate.

Watson v. Brickwood approved by Lord Eldon.

Of this case Lord Eldon has said, (q) that he thought it was rightly decided, taking the will and codicil together; "but if," he said, "the codicil had not existed, there are circumstances which appear to me to be such as might have given occasion to some observations which do not occur either in the judgment or in the argument; *still I repeat that I think that case was rightly decided.*"

Watson v. Brickwood is an important authority on the general *doctrine, since no case better exemplifies the species of evidence which is necessary to exonerate the personal estate, as distinguished from mere conjecture. It would have been well if this principle had been steadily adhered to.

Effect where the gift is of *all* the personal estate to person made executor.

Another question which has much divided the opinions of judges is, whether the circumstances of the bequest being of *all* the personal estate (with or without an enumeration of particulars), not a gift of *the residue*, demonstrates an intention to exempt it from the charges to which the general personal estate is primarily liable. The negative appears to have been decided in several instances where the legatee was appointed executor, a circumstance which has always been considered to favor the non-exemption, by raising the inference that the legatee was to take the personalty subject to the charges devolving upon him in the character of executor. French v. Chichester (r) has generally been treated as a case of this kind. The testator there directed that the trustees of a certain real estate which he had conveyed by deed should out of the trust estate pay his debts, legacies and funerals; and

Bequest of *all* the personal estate *not otherwise disposed of* to executrix.

devised to his wife, whom he made executrix, *all his personal estate not otherwise disposed of*, intending thereby a provision for her, she having been prevailed upon to sell away part of her own inheritance. Lord Keeper Wright, and afterwards Lord Cowper, held that the devise being in the same clause in which she was named executrix, and not said exempt from

(q) In Bootle v. Blundell, 1 Mer. 230. Harewood v. Child and Bromhale v. Wilbraham, cit. Cas. temp. Talb. 204.]

(r) 2 Vern. 568, 1 B. P. C. Toml. 192; but see Cas. temp. Talb. 209. [And see

the payment of debts, she must therefore take it as executrix, and the same must be applied in payment of debts.

But in this case the words "not otherwise disposed of" render it scarcely distinguishable from that of a residuary bequest. A similar remark applies to Watson *v.* Brickwood (*s*) and Bootle *v.* Blundell; (*t*) but as in both these cases there were anterior specific bequests, to which the words "hereinbefore disposed of" might relate, no argument against the exemption could be drawn from them. It is only where the will contains no other disposition than the charges which are to come out of the personal estate that such an argument applies; and it would seem, by parity of reason, that it is then only that even the circumstance of the gift being *residuary* raises any very strong *inference *against* the exemption, though in every case the fact of the bequest *not* being residuary in its terms may afford an argument *in favor of* the exemption.

Trust to pay *all* the debts and bequest of *all* moneys, &c., to executor.

The case of Brummel *v.* Prothero, (*u*) however, seems more directly to support the doctrine in question; and it is observable that in this case the land was devised in trust to pay *all* the testator's debts. The testator devised all his real estate to A and his heirs, in trust, in the first place, to pay *all* his just debts, and then to other limitations. Lastly, he gave and bequeathed unto his brother E. all his *moneys, goods, chattels, rights, credits, personal estate and effects*, whatsoever and wheresoever, *and appointed him executor*. Sir R. P. Arden, M. R., at first expressed an opinion that a direction to pay *all* the debts would, according to the authorities, throw them upon the land only; but he afterwards came to a contrary conclusion, observing that the case was stripped of every circumstance to exonerate the personal estate, except that of a devise to a trustee for payment of debts, and a general bequest of the personal estate to the executor; and that there was no one case since French *v.* Chichester, the first upon the subject, in which such words as these had been held alone sufficient to exempt the personal estate. (*x*)

(*s*) 9 Ves. 447.

(*t*) 1 Mer. 193.

(*u*) 3 Ves. 111.

Cases of exemption upon grounds not now deemed satisfactory.—(*x*) This is not quite correct. There are several cases in which a contrary decision has occurred under circumstances hardly distinguishable. Thus, in Kynaston *v.* Kynaston, 1 B. C. C. 457, n., a testator charged his whole estate with the payment of all his debts, legacies and funeral expenses, and for that purpose devised particular lands to trustees, upon trust to sell the same and pay his debts, legacies and funeral expenses; and he gave to

So, in Aldridge *v.* Lord Wallscourt, (*y*) where A devised all his lands to trustees (subject to the payment of his just debts, funeral expenses, and several portions afterwards charged for his daughters) to certain limitations, and directed his trustees *to raise certain portions for his daughters. He appointed T., his son, executor, and bequeathed him *all* his personal estate in trust for such persons as he (the testator) should appoint. By a codicil reciting that bequest, he directed his executor to hold the personal estate in trust for his daughter M. Lord Manners thought there was nothing to exempt the personal estate from its primary liability to debts.

Devise subject to debts, &c., and bequest of *all* the personalty to executors upon trust.

In this case the legatee herself was not the executrix, but as the subject of gift was to flow to her through the executor as trustee, it might be considered as subject to charges attaching to him in that character, and consequently as falling under the same principle.

Remark on Aldridge *v.* Lord Wallscourt.

[But the personal estate has been held not to be exonerated, even where the legatee of all the personalty was not made executor. Thus, in Collis *v.* Robins, (*z*) the testator devised his real estate to trustees, upon trust to sell, and out of the produce to pay the testator's debts, and the costs, charges and expenses of the trustees (who were also executors), and certain legacies; and he bequeathed *all* his ready money and securities for money, and *all* other his personal estate to his godson who was not an executor. Sir J. K. Bruce, V. C., (observing that it

Trust to sell realty and pay debts and bequest of all personalty to person not executor.

his wife *all* his personal estate whatsoever, and constituted her sole executrix. The debts exceeded the personal estate (a circumstance which is now immaterial.) Lord Bathurst determined the personal estate to be exempt.

So, in Holliday *v.* Bowman, cit. 1 B. C. C. 145, A devised a manor to trustees, in trust to sell, and directed the moneys to be raised thereby to be paid in discharge of all his debts; and after payment thereof, in the first place to invest the residue, and pay the interest to his wife for life, and the principal, after her decease, to B; and after several specific and pecuniary legacies, gave to his wife *all* his goods and chattels, and appointed her executrix. It was held, upon the authority of Kynaston *v.* Kynaston, that the personalty was exempt from the debts. Bamfield *v.* Wyndham, Pre. Ch. 101, is a case of the same kind, but is much weakened as an authority by the stress that was laid upon the inadequacy of the personalty to pay the debts. How far Lord Bathurst was influenced by this circumstance in Kynaston *v.* Kynaston does not appear; but it is evident that both this case and Holliday *v.* Bowman are overruled by Brummel *v.* Prothero. It would have been more satisfactory if they had been noticed in that case.

(*y*) 1 Ba. & Be. 312.

[(*z*) 1 De G. & S. 131.

was admitted that the funeral and testamentary expenses did not come under the description of the trustees' costs, charges and expenses), decided that the personal estate was not exonerated.

So, in Ouseley *v.* Anstruther, (*a*) the testator devised his real property to trustees, upon trust, in the first place, subject to the payment of his funeral expenses, of any debts unpaid at his death, of his wife's jointure, and the annuities and legacies bequeathed by him, in trust for his son for life, with remainders over; and he bequeathed to his son, who was not executor, all his personal property for his absolute use after his (the testator's) wife's death, except a piece of plate which was to be an heirloom. Lord Langdale, M. R., held that the personalty was not exonerated from payment of the debts.]

Charge of debts on realty and bequest of all personalty to persons not executors.

But though these cases may seem to authorize the conclusion that, [whether the legatee is appointed executor or not] and notwithstanding the funeral expenses are thrown upon the land, the personalty is not exempted by the mere circumstance of the bequest being of *all* the personal estate, with or without an *enumeration of particular species of property, yet in several instances the distinction between such a bequest and a gift of the *residue* has been treated as having weight.

Conclusion from preceding cases.

Thus, in Tower *v.* Lord Rous, (*b*) Sir W. Grant, M. R., observed that there was nothing except the common residuary clause, not "all my personal estate," not "all which I have not hereinbefore disposed of," or any other of those forms *which in several cases have been held to denote an intention to give the personal estate as a specific bequest.* And Lord Eldon in Bootle *v.* Blundell, (*c*) observed, in reference to Duke of Ancaster *v.* Mayer, (*d*) that a great deal of argument might have been raised as to the distinction between a gift of residue, as residue, and a bequest of enumerated particulars followed by the words "and personal estate whatsoever," not "and all *the residue of* my personal estate;" though he admitted that the argument in this case was excluded by a subsequent clause, in which the testator referred to the bequest as a gift of "the residue." It should be observed, too, that in Duke of Ancaster *v.* Mayer there were circumstances which operated quite as strongly against the exemption as in Brummel *v.* Prothero. The same

Distinction between a residuary bequest and gift of *all* the personalty.

(*a*) 10 Beav. 453.]
(*b*) 18 Ves. 139.
(*c*) 1 Mer. 228.
(*d*) 1 B. C. C. 454.

persons were appointed *trustees* of the term to raise money to pay the debts and funeral charges *and executors* (which has been generally considered to favor the non-exemption; (*e*) and there was even a direction to them as "executors" to pay the funeral charges, debts and legacies; and they were to reimburse themselves the expenses attending the execution of the will out of the personal estate or moneys to be raised by the term; and yet, under these circumstances, all tending to oppose the exemption, Lord Eldon thought the distinction between a gift of enumerated particulars followed by a bequest of the *residue*, and of *all* the personal estate, entitled to some weight. It is unfortunate that Brummel *v.* Prothero was not among the numerous decisions cited by him in Bootle *v.* Blundell.

Bequest of *all* the ready money, &c., and personal estate.

In several subsequent cases, indeed, one main ground of *exemption was the fact of the personalty being given, not as a residue, but as *all* the personal estate, accompanied by an enumeration of articles, notwithstanding that in one of them it may be inferred that the trustees of the real estate were executors; but it is observable that in all these cases the real estate was onerated with all the charges to which the personal estate is liable, namely, the debts, funeral expenses and costs of proving the will. The first is Greene *v.* Greene, (*f*) where the testator, in the first place, gave and bequeathed unto his wife all his *ready money, securities for money, goods, chattels and other personal estate and effects whatsoever*, which he should be possessed of or entitled to at the time of his decease, except such part or parts thereof which, by that his will, or by any codicil or codicils thereto, he should dispose of specifically to and for her own sole and absolute use; he also devised his real estate to A, B and C, upon trust for sale, directing them, out of the moneys arising from such sale, to pay *his debts, funeral expenses and the costs of proving his will;* and, after payment thereof, to invest the residue upon certain trusts for

Devise of real estate upon trust to pay debts, funeral and testamentary expenses,

(*e*) See Lord Northington's judgment in Stephenson *v.* Heathcote, 1 Ed. 38; Lord Thurlow's in Duke of Ancaster *v.* Mayer, 1 B. C. C. 454, (see also 1 Mer. 223); Lord Alvanley's in Burton *v.* Knowlton, 3 Ves. 108. But see Lord Hardwicke's judgment in Walker *v.* Jackson, 2 Atk. 624; and Lord Eldon's judgment in Bootle *v.* Blundell, 1 Mer. 227, where, though he seems to have treated this circumstance as adverse to the exemption, yet he admitted that there might be such a cautious discrimination of the two characters of trustee and executor as not only to render their union in the same person unimportant, but afford an inference in favor of the exemption.

(*f*) 4 Mad. 148.

his wife for life, and then for his children; and he appointed his wife and A, B and C executrix and executors. Sir J. Leach, V. C., held the personal estate to be exempt, observing that the direction that the trustees, "who formed only a part of the executorship," should, out of the produce by sale of the real estate, pay all debts and expenses, and after payment thereof invest the surplus for the benefit of the wife for life, with remainder to the children, when coupled with the circumstance that the devise to the trustees was expressly made subject to the payment of debts and funeral expenses, and with the gift to the wife for her own sole and absolute use of all the testator's ready money, securities for money, goods, chattels and other personal estate and effects whatsoever, which the testator should be possessed of at the time of his death, did appear to him to convey a clear intimation of intention, not that this real estate should be auxiliary only, to be applied in case the personal estate should prove deficient, but that the real estate should directly and at all events be applied as the primary fund for the payment of the debts, funeral expenses and the expenses of the probate, and that the wife should take the personal estate exempt from those charges. He distinguished the case from Duke of Ancaster *v.* Mayer, (*g*) *Stephenson *v.* Heathcote, (*h*) Inchiquin *v.* O'Brien, (*i*) Tait *v.* Northwick, (*k*) and Watson *v.* Brickwood, (*l*) on the ground that in those cases the bequest was of a residue; and observed that in the last it was given expressly after payment of debts, funeral expenses and legacies. He relied upon Burton *v.* Knowlton (*m*) and Kynaston *v.* Kynaston. (*n*) But in reference to Watson *v.* Brickwood, it is to be observed that the clause expressly subjecting the personalty

and gift of *all* personal estate.

Personalty held to be exempt.

(*g*) 1 B. C. C. 454.

(*h*) 1 Ed. 38.

(*i*) Amb. 33.

(*k*) 4 Ves. 816.

(*l*) 9 Ves. 447.

(*m*) 3 Ves. 107; but this case has been noticed with disapprobation both by Lord Loughborough, in Tait *v.* Northwick, 4 Ves. 803, and by Lord Eldon, in Bootle *v.* Blundell, 1 Mer. 229. Besides, it was a bequest of *the residue*, which increases the surprise that it should be cited by Sir J. Leach, who rested the exemption mainly on the circumstance of the bequest being of the whole, as distinguished from the residue, of the personal estate.

(*n*) Cit. 1 B. C. C. 457. The authority of this case is considerably weakened by the stress laid on the inadequacy of the personal estate to pay the debts. It is clearly irreconcilable with the current of authorities, particularly French *v.* Chichester, *ante* p. *661, Brummel *v.* Prothero, *ante* p. *662, and Aldridge *v.* Lord Wallscourt, *ante* p. *662, being nothing more than a charge upon the land of all the debts, and a gift of all the personal estate to the individual who was appointed executrix. According to those cases, therefore, the personalty was not exempt.

to the payment of legacies, funeral expenses and debts, referred to simple contract debts only; whereas the only argument in favor of the exemption much insisted on was in relation to specialty debts, the exclusion of which from the clause in question favored their being thrown exclusively on the real estate.

Remarks upon Greene v. Greene.

The principal circumstances in which Greene *v.* Greene differs from Brummel *v.* Prothero, (*o*) are, that in the latter case the legatees of the personalty were also the executors, whereas in Greene *v.* Greene the legatee was only *one* of the executors, and the land was onerated with *all* the charges which would otherwise have come out of the personal estate, namely, the debts and funeral *and testamentary* expenses; (*p*) but in Brummel *v.* Prothero with the debts only.

Gift of *all* the personalty and charge extending to funeral and testamentary expenses.

So, in Michell *v.* Michell, (*q*) where a testator bequeathed to his daughters E. and M. all and singular his *plate, linen, china, household goods and furniture and effects,* which he should die possessed of; and devised his real estate to trustees, upon trust to pay his funeral expenses, costs of proving his will, and in the next place to retain all sum and sums of money then due or thereafter to grow due from him to them respectively on mortgage bond or memorandum, and the interest thereof, and also to pay all such other debts as should be owing from him at the *time of his decease, and divide the residue among his children; Sir J. Leach, on the authority of the last case, held that the real estate was made the primary fund for these charges. The executors appear to have been the trustees of the real estate, as they proved the will. It is evident, therefore, that the V. C. did not consider the union of the two characters of trustees and executors sufficient to negative the exemption in such a case.

The same remark applies to Driver *v.* Ferrand, (*r*) decided by the same judge, where a similar construction prevailed; the charge on the real estate extended to debts, legacies, funeral and testamentary expenses, and the bequest of personalty was not residuary in its terms, but the legatee was one of the executors. A difficulty in the way of the construction was that the legacies were directed to be paid by the executors, but Sir J. Leach considered this to be inconclusive, as they

(*o*) *Ante* p. *662.

(*p*) See an observation upon this, *ante* p. *664.

(*q*) 5 Mad. 69.

(*r*) 1 R. & My. 681.

were also trustees; and that the testator in such direction had in view the real estate was, he thought, shown by a clause which immediately followed, authorizing the trustees to deduct their expenses out of the real estate.

So, in Blount *v.* Hipkins, (*s*) where a testator gave to his wife M. all his household goods, plate, linen, china, pictures, farming stock, ready money, debts, personal estate and effects of every kind which he should happen to die possessed of, except certain articles which he bequeathed to another person. The testator devised certain real estate to his wife M. He then gave all other his real estate to trustees upon trust for sale, and out of the proceeds to pay his funeral expenses, the costs of proving his will, and all his debts (including a mortgage on the estate devised to M.) and certain legacies and the residue of the proceeds to G. Sir L. Shadwell, V. C., considered it to be clear that the personal estate bequeathed to the wife was intended to be exonerated from his debts.

So, in Jones *v.* Bruce, (*t*) where a testator gave to his wife absolutely all his goods, chattels and personal estate whatsoever and wheresoever, and charged his real estate in D. and S. with the payment of his funeral and testamentary expenses and debts, and he exempted, so far as he was able, his personal estate from the payment thereof. He then gave certain legacies to children, *and charged all his real estate with the payment thereof, and directed that until the legacies were payable the trustees should raise out of the rents any annual sums by way of maintenance not exceeding £4 per cent. The testator then gave his real estate, subject as to such portions thereof as were situate in D. and S. to the charges thereinbefore mentioned, and subject also to such charges as they were then liable to, to his wife for life, with remainders over. Sir L. Shadwell, V. C., held the real estate to be the primary fund for payment of the legacies, adverting much to the terms in which the personalty was bequeathed, and the gift of interest out of the rents of the real estate.

Gift of *all* the personalty, and charge of realty with debts, and funeral and testamentary expenses *and exemption of personal estate therefrom;* and gift of legacies without such exemption. Latter held also charged on land primarily.

[And in Lance *v.* Aglionby, (*u*) where the testator gave all his real

(*s*) 7 Sim. 43. [See also Plenty *v.* West, 16 Beav. 173; where, however, undue weight appears to have been allowed to the phrase "in the first place:" see Newbegin *v.* Bell, 23 Beav. 386.]

(*t*) 11 Sim. 221; [and see Coote *v.* Coote, 3 Jo. & Lat. 175.

(*u*) 27 Beav. 65. See also Gilbertson *v.* Gilbertson, 34 Beav. 354; Powell *v.* Riley, L. R., 12 Eq. 175.

Will creating mixed fund for payment of debts, funeral expenses, &c., and codicil giving *all* personal estate; the latter held exempted.

and the residue of his personal estate to trustees to be converted, and to form a mixed fund for payment of his debts, funeral and testamentary expenses and legacies, and gave the rents of the real estate and the income of the residue of the personal estate to his wife for life, with remainder over. By a codicil the testator gave "all his personal estate whatsoever and wheresoever" to his wife. Sir J. Romilly, M. R., held that the wife took the personalty free from the funeral and testamentary expenses, debts and legacies.]

General conclusion from preceding cases.

These cases, then, seem to authorize the proposition that wherever the personal estate is bequeathed in terms as a whole and not as a residue, and the debts, funeral and testamentary charges are thrown on the real estate, this constitutes the primary fund for their liquidation. In Jones *v.* Bruce, the principle was applied to legacies, where the funeral and testamentary charges and debts were thrown on the realty expressly as the primary fund. [But where the personal estate is bequeathed expressly subject to debts, funeral and testamentary expenses, the principle of these cases is of course inapplicable.] (*x*)

Non-exemption from mere charging of real estate.

That Sir J. Leach did not mean by his preceding adjudications to deny the general rule appears from the subsequent case of Rhodes *v.* Rudge, (*y*) where a testator gave all his real and personal estate to A and B upon trust, in the first place, to sell and dispose of the living of C, and the money to arise from the sale thereof to go in discharge of his debts and legacies and the charges of the trusts thereby created, and if such money were *not sufficient to discharge the said debts and legacies, upon trust to cause timber to be felled on his real estates to the amount of £500, to be applied in discharge thereof; and if that should not be sufficient, then upon trust by mortgage or sale to raise such deficiency out of his real estates; and the testator then proceeded to give certain legacies, and appointed A and B executors of his will. Sir J. Leach, V. C., thought that there was nothing in this will to change the usual order of application, and therefore that the personalty was primarily to be applied.

No case could well be stronger against the exemption than this; the

(*x*) Paterson *v.* Scott, 1 D., M. & G. 531, 21 L. J., Ch. 346. The bequest was of the personal estate "not thereinbefore otherwise disposed of;" as to which, see *ante* p. *661.]

(*y*) 1 Sim. 79.

same persons who were trustees of the real and personal estate were also executors, and there was no other bequest of the personal estate than to these trustees.

Remark on Rhodes v. Rudge.

The personal estate is of course held to be exempt from debts where real estate is devised to be sold to pay debts, with a direction that the residue shall *be added to the testator's personal estate*, (z) which is obviously incompatible with the primary application of the personalty. So, where the testator declares that he has charged his lands with the payment of his debts in order that the personal estate may *come clear to the legatee:* (a) [or where he has directed the proceeds of his real estate to be applied "in part payment" of certain legacies; which is equivalent to "in payment as far as the proceeds will extend."] (b)

Residue of real fund to be added to personalty.

Personalty to "come clear" to the legatee.

Realty to go "in part payment."

Again, where the testator charges his debts, funeral and testamentary expenses and legacies, on estate A "as a primary fund," and in case that should be deficient, he charges estate B with the deficiency, he thereby conclusively shows that the latter estate is the secondary fund in exoneration of the personal estate. (c) [So, a direction to pay out of the personal estate so much of the debts as the realty previously given for payment of them would not extend to pay, would seem to make the realty primarily liable. (d) And where a testator gave his real estate in moieties to his two daughters M. and S. and their families, *and by codicil directed a particular debt which he had incurred on behalf of M.'s husband to be "exclusively and in the first instance" paid out of the M. moiety, the testator's "intention being that the S. moiety should be exempt from payment of it," it was held by Sir R. Malins, V. C., that the personal estate was exonerated, adopting (it would seem) the argument of counsel that the generality

Estate made *secondary* fund in exoneration of personalty.

Personalty to pay in aid of realty.

(z) Webb v. Jones, 2 B. C. C. 60, 1 Cox 245. [And see 1 Jo. & Lat. 365, 366; Shallcross v. Wright, 12 Beav. 505. But see Wythe v. Henniker, 2 My. & K. 635, *ante* p. *635.]

(a) March v. Fowkes, Finch 414.

(b) Bunting v. Marriott, 19 Beav. 163. The direction referred to "freehold, copyhold, and leasehold estate, and any other interest in land;" and though there was in fact nothing but leaseholds, yet that circumstance does not appear to make, and was not treated as making, any difference.]

(c) Dawes v. Scott, 5 Russ. 32. [See also Bateman v. Earl of Roden, 1 Jo. & Lat. 366; Evans v. Evans, 17 Sim. 106; Bessant v. Noble, 26 L. J., Ch. 236.

(d) *Semb.*, see Wills v. Bourne, L. R., 16 Eq. 487.

of the exclusive charge was not cut down by the statement of *a* motive.] (*e*)

Bootle *v.* Blundell.

In the much-considered case of Bootle *v.* Blundell, (*f*) the testator first directed his funeral expenses to be paid. He then gave to his son R., and his daughters S. and J., £3000 each, with the substitution of their children in a certain event. The testator then directed that his said funeral expenses and legacies should be paid out of such moneys as he should have by him, moneys due to him from C, and out of rents and fines which should be due to him; and gave the surplus unto his son and daughters. The testator then devised all his manors of Lostock, &c., to A, B and C, for 500 years, in trust out of the rents *to pay* HIS DEBTS, and also all such annuities or legacies as were thereinafter mentioned, or which he might thereafter specify in any codicil or instrument in writing. He then bequeathed certain legacies, including one of £300, to each of his trustees for their trouble, and several annuities, among the rest one to his housekeeper M. The testator then declared that his trustees and executors should not be answerable for any losses, and that if they were called to such account, or sustained any expenses in respect thereof, the same, and also at all events all other their costs and expenses, should stand charged upon his said hereditaments, and be paid out of the rents and profits thereof; and that so soon as the trusts of the term should have been satisfied, and all the expenses incident thereto discharged, the remainder of the term should thenceforth cease; and, subject thereto, he devised his said manors, &c., in undivided moieties to his two daughters and their issue, in strict settlement. The testator then appointed a certain person to be steward and agent, to have the management of the estates comprised in the said term of 500 years, so long as the same should remain in the hands of his trustees, with particular directions as to his salary and conduct, and afterwards proceeded as follows:—"And it is my will that *as soon as the debts hereby charged on my said estate, and the legacies or sums of money hereby given, are paid and satisfied, and as soon as such satisfactory security shall have been given by my said trustees for the due payment of the said annuities and all expenses as shall satisfy the said annuitants, and when all expenses incurred in

(*e*) Forrest *v.* Prescott, L. R., 10 Eq. 545. No point was made of its being the case of a *particular* debt, as to which see *post* p. *675.]

(*f*) 1 Mer. 193, 19 Ves. 494.

the execution of the said trusts respecting the said term and of this will shall be fully paid, then the person or persons who shall at that time be next entitled to the same estates under and by virtue of the limitations in this my will contained, shall be let into the possession thereof." (*g*) The testator then provided for the appointment of new trustees in certain events, who were to be allowed out of the rents and profits of the estates comprised in the term of 500 years the sum of £300. He also devised one-half of the manor of Lydiate, and all the lands purchased by him in Ince, &c., not thereinbefore disposed of, to the use of his son C for life, with remainders over; and directed that all his pictures, drawing-books, prints, statues and marbles, should be enjoyed by his son during his life, and after his decease he gave the same to the first son of his body who should attain twenty-one; his intention being that they should go along with the capital messuage called Ince Hall. After devising to J. certain lead-mines, and to M., his housekeeper, several articles of furniture and other things, which he directed should be removed by his executors at the expense of his personal estate, the testator bequeathed to his said son the furniture of his house, his wines, horses, cattle and carriages, plate, *and other his goods, chattels and personal estate not thereinbefore specifically disposed of*, or which might thereafter be disposed of by him; and appointed the said A, B and C executors of his will, providing that immediately after his decease his executors should enter into his dwelling-house, and take into their custody all moneys and papers there found. By a codicil the testator, after noticing the devise to his son of his estate at Lydiate, and that attempts might be made to invalidate some of the dispositions of his will or codicil, and the trustees and executors, or other devisees, might incur expenses in supporting the same, which expenses it was his will should be paid out of the said lands, and not be a charge upon any other part of his property, he thereby devised the said hall, manor, &c., unto the said *A, B and C, trustees and executors named in his said will, their executors, administrators and assigns for the term of 1000 years, in trust by sale, lease or mortgage, or out of the rents and profits, to raise such moneys as should be sufficient to pay all expenses which should be so incurred.

(*g*) This clause is very important, for the testator could hardly intend that the devisees should be kept out of possession until the whole personal estate was administered, which would be the consequence of holding it to be not exempt from the debts.

Lord Eldon's judgment.

The question was, whether the estates comprised in the term of 500 years were liable, in the first place, to the payment of the testator's debts in exoneration of the personal estate. Lord Eldon, after much consideration, and reviewing most of the authorities, held that it was: he adverted to the circumstance, that though the same persons were trustees and executors, the two characters were anxiously kept distinct; the testator never using the word "executors" but with reference to the personal estate, nor the word "trustees" but with reference to the real estate; that the clause charging the expenses on the estates devised, having blended together the costs attending the real and personal estate, made it impossible to say that the testator could have meant that the costs of the real estate should be paid out of the real estate, but that the costs of the personal estate should not be paid in the same manner except in the case of a deficiency of the personal estate; that the [proviso for cesser amounted to a direction] that his funeral expenses should not be paid out of his general personal estate; that the costs of performing the trusts of his real estate should be paid out of the rents and profits of the estates devised; and that the persons respectively entitled under his will should not be let into possession of the devised estates until payment of all debts and legacies, and security given for payment of the annuities; that the new trustee of the term to be appointed should receive the sum of £300 out of the rents and profits of the estates comprised in the term; that the purpose of keeping together, as objects of public curiosity, the pictures, &c., sufficiently accounted for their being set aside from the rest of the personal estate given to his son, without resorting to the supposition that it was merely to exempt them from the debts and legacies to which the remainder was meant to be liable; that because the testator had charged his personal estate with the costs of removing the specific articles given to Mrs. M., it did not follow (as had been insisted) that it should also be liable to the payment of his debts and legacies; that the words "not hereinbefore specifically disposed of" might be taken to mean specifically to dispose to his son of what was not specifically disposed of *to others*, and not as referring to the *application of the personalty to debts, &c.; and, lastly, (on which his lordship laid much stress,) that the costs incurred by the litigation of the will were to be paid exclusively out of the real estate; though he doubted whether, if there were no circumstances in the *will* that afforded a ground for saying the personal estate should

be exempted, this provision alone in the codicil would have been a sufficient manifestation of the intention to exempt it. He nevertheless thought that it deserved great consideration.

Effect where bequest of exempted personalty lapses.

Here it may be observed that the exemption of the personalty in favor of the *legatee* does not necessarily extend to the *next of kin*, in case of the failure of the bequest thereof by lapse or otherwise. Thus it was laid down by Sir R. P. Arden in Waring *v.* Ward, (*h*) that if an estate be given to A, subject to debts, and the personal estate to B exempt from debts, that exemption is to be considered as intended only for the benefit of B, and not as a general exemption of the personal estate.

—where personalty originally undisposed of.

On the other hand, if the testator [without] bequeathing the personal estate, directed that it should not be applied in payment of mortgages, and gave the mortgaged estates to different persons, *they paying out of them the mortgages*, the devisees would take *cum onere* even as against the next of kin. (*i*)

The distinction is that [in the one case there was an absolute bequest of the personal estate, while in the other there was none. The principle is this: there being no particular bequest of the personal estate, and yet the testator intending to exonerate the personal estate, it was impossible to say that he intended that exoneration for the benefit of any particular person or object, and he must be taken to have intended that the exoneration should enure for the benefit of the persons, whoever they might be, upon whom the personal estate might devolve.] (*k*)

Distinction between a general charge of *legacies* and a trust to pay certain sums.

It has been already stated that under a general charge of or a trust to pay *legacies*, the several funds liable to their liquida-*tion are applied in the same order as in the case of *debts*, and therefore the general personal estate, if not exempted, is first applicable; (*l*) but such cases are carefully to be

(*h*) 5 Ves. 676. See also Hale *v.* Cox, 3 B. C. C. 322; Noel *v.* Lord Henley, 7 Price 240, Dan. 211; [Dacre *v.* Patrickson, 1 Dr. & Sm. 186. See also Coventry *v.* Coventry, 2 Dr. & Sm. 470, where specific parts of the personalty were expressly exempted, and bequeathed to one for life, and afterwards "to fall into the residue," which was also bequeathed. But the report is obscure. The V. C. is made to rely on Webb *v.* De Beauvoisin, 31 Beav. 573, where the question of charging real estate did not arise. Compare Fisher *v.* Fisher, 2 Keen 610.]

(*i*) Milnes *v.* Slater, 8 Ves. 305.

[(*k*) Per Kindersley, V. C., in Dacre *v.* Patrickson, 1 Dr. & Sm. 186, 189.

(*l*) Roberts *v.* Roberts, 13 Sim. 349;

distinguished from those in which the trust is to pay certain specified sums, when, *as the only gift is in the direction to pay them out of the land*, that fund alone is liable. (*m*)

Thus where a testator devises his estate to trustees, upon trust to sell, and out of the proceeds to pay legacies generally, and afterwards gives to A a legacy of £100, that legacy will be charged upon the land in aid of the personalty only; but if the devise be upon trust to sell, and out of the produce to pay to A £100, the sum so given will be considered as a portion of the real estate, and will in no event be payable out of the personalty, and if the testator sell the estate in his lifetime, the legacy will be adeemed. (*n*)

Sums directed to be paid out of specific fund.

And in Spurway *v.* Glynn, (*o*) Sir W. Grant thought that a direction at the end of the will, that the personal estate should be applied in payment of *legacies* in exoneration of the real estate, did not apply to a sum given out of a particular estate of which there was no other gift than the trust so to pay it.

Charge of specified legacies on realty, and gift of personalty subject to debts.

[Again, in Ion *v.* Ashton, (*p*) the testator bequeathed certain legacies and annuities and charged some of them on his lands at H., and the rest on his lands at O., and devised the estates so subject, one to A and the other to B. He then gave all his personal estate to trustees on trust to convert and pay debts and funeral and testamentary expenses, and the expenses of proving his will and the costs of converting his personal estate, and to pay the residue to a charity. Sir J. Romilly, M. R., held that the effect was to lay upon the real estate certain charges

Ouseley *v.* Anstruther, 10 Beav. 453; Davies *v.* Ashford, 15 Sim. 42; Boughton *v.* Boughton, 1 H. L. Cas. 406, reversing 1 Coll. 35; Whieldon *v.* Spode, 15 Beav. 537; Patching *v.* Barnett, W. N. 1880, p. 135.]

(*m*) Whaley *v.* Cox, 2 Eq. Cas. Ab. 549, pl. 29; Amesbury *v.* Brown, 1 Ves. 482; Phipps *v.* Annesley, 2 Atk. 57; Ward *v.* Dudley, 2 B. C. C. 316, 1 Cox 438, 7 B. P. C. Toml. 566; Reade *v.* Litchfield, 3 Ves. 475; Hartley *v.* Hurle, 5 Ves. 545; Brydges *v.* Phillips, 6 Ves. 571; Spurway *v.* Glynn, 8 Ves. 483; Hancox *v.* Abbey, 11 Ves. 179; Aldridge *v.* Wallscourt, 1 Ba. & Be. 312; Noel *v.* Lord Henley, 7 Pri. 241, 12 Pri. 213, Dan. 211, 322; [Ricketts *v.* Ladley, 3 Russ. 418; Jones *v.* Bruce, 11 Sim. 22; Ashby *v.* Ashby, 1 Coll. 549; Roberts *v.* Roberts, 13 Sim. 345; Evans *v.* Evans, 17 Id. 102; Dickin *v.* Edwards, 4 Hare 273; Bessant *v.* Noble, 26 L. J., Ch. 236.] But see Holford *v.* Wood, 4 Ves. 78; [Colvile *v.* Middleton, 3 Beav. 570.]

(*n*) Newbold *v.* Roadnight, 1 R. & My. 677.

(*o*) 9 Ves. 483.

(*p*) [28 Beav. 379. See also Lomax *v.* Lomax, 12 Beav. 290; Woodhead *v.* Turner, 4 De G. & S. 429; Sinnett *v.* Herbert, L. R., 12 Eq. 201.]

which were specified, and then to give it subject thereto, and on the personal estate to lay other charges, and then give it subject *thereto, and therefore that the annuities and legacies were charged exclusively on the real estate.]

It seems that in these cases, if the sums in question are bequeathed free from the legacy duty, the duty will be payable out of the same fund as the legacy. (p)

Legacy duty, out of what fund payable.

It does not however necessarily follow that the principle above stated applies to trusts for the payment of particular *debts* to which the personal estate was antecedently liable, and with respect to which therefore the charging the land would seem to be merely for the purpose of providing an auxiliary fund for those debts, not in order to discharge the personalty.

Trust to pay particular *debts*.

The contrary indeed seems to have been assumed by Sir W. Grant in Hancox *v.* Abbey, (q) for he held that a devise of real estate to trustees, upon trust to sell, and to pay a mortgage due on some part of the testator's property, subjected the land in the first instance, although the personalty was given "after payment of debts, legacies and funeral expenses," but which his Honor thought might be construed, after payment of debts not before provided for.

This doctrine and decision however are inconsistent with the principle upon which the more recent case of Noel *v.* Lord Henley (r) was professedly decided. The testator devised lands upon trust for sale, and directed the trustees to stand possessed of the moneys arising therefrom upon trust to pay a mortgage debt of £2000 affecting one of his estates; and in the next place to pay all costs, &c.; and then to pay a sum of £20,000 due on mortgage of certain parts of the testator's other estates thereinbefore devised; and upon further trust to pay £5000 to his wife (which lapsed) and the sum of £3000 to T., both which last-mentioned sums the testator directed to be paid as soon as sufficient moneys should arise by such sale or sales after the other payments thereinbefore directed to be made thereout, and that the same should carry interest from his death. The testator then directed his trustees out of the moneys to arise from the sale to pay so much of his *other just debts*, and of the pecuniary lega-

Noel *v.* Lord Henley.

(p) Noel *v.* Lord Henley, 7 Pri. 241, Dan. 211. See also Stow *v.* Davenport, 5 B. & Ad. 359. But generally a gift of legacy duty is a mere pecuniary legacy, Farrer *v.* St. Catharine's College, L. R., 16 Eq. 25.]

(q) 11 Ves. 179.

(r) 7 Pri. 241, Dan. 211.

cies thereinafter by him bequeathed, as his own personal estate or the personal estate of his uncle R. should not extend to pay; and after such payments to invest the residue of the said moneys upon trust for certain persons; and then, after giving *several legacies, he declared that all his legacies should be paid without any deduction of the legacy duty; and he bequeathed all the residue of his personal estate after payment of such of his debts as were not therein otherwise provided for and of his legacies, &c., to his wife, her heirs, executors, administrators and assigns, and appointed his said wife and two other persons executrix and executors. One question was whether the sums of £2000, £20,000 and £3000 were payable out of the land exclusively, or only in aid of the personal estate. Richards, C. B., thought there was not sufficient evidence of an intention to exonerate the personalty from these sums; for though he admitted that there was no doubt that the testator, in giving the residue of his personal estate after payment of such of his debts as were not therein otherwise provided for intended to exonerate some part of his personal estate from its liability to pay some of his debts, yet it did not appear what debts, and there was no intimation that he meant the sums particularized as distinguished from the rest of his debts. He thought it was the ordinary case of a testator giving his personal estate to A, and his real estate to B subject to the payment of his debts, and that the circumstance of his having enumerated particular debts made no difference. He could not make any distinction between a direction that real estate should be chargeable with a *particular* debt of £20,000 and a devise of real estate subject to *all* the testator's debts; for the £20,000 was only part of these debts. But he thought that legacies stood upon a very different footing: debts (he said) were *prima facie* to be paid out of the personal estate, legacies might be paid out of the personal or out of the real estate according to the intention of the testator; therefore such *legacies* as were not thrown upon the personal estate were not to be paid out of it. The court accordingly held that the mortgage of £2000 (which it appeared was not the testator's own debt, but was created by a prior owner from whom the lands had descended to him) (s) with the £3000 and the legacy duty on both these sums were to be paid out of the real estate exclusively; but that the testator's mortgage debt of £20,000 and duty were to be raised out of it only in aid of the personal estate.

No distinction between direction to pay particular debts and debts generally.

(s) As to this, see *ante* p. *637.

As to the £20,000 the decree was reversed in D. P. (*t*) but merely on the ground that the mortgage was the debt of the estate, not of the devisor, having been made for the purpose of liquidating encumbrances created by the preceding owner. (*u*)

Remarks on Noel *v.* Lord Henley.

*If there had been nothing more than a general provision for debts, as the C. B. appears from some of his observations to have thought, the case is not an adjudication upon the point in question: but considering the testator's anxious discrimination between the enumerated debts and the others, (*x*) and his subsequent reference to the debts as consisting of two classes, there was perhaps some difficulty in so treating it. [Lord Eldon in D. P. laid great stress on the distinction thus drawn by the testator, (*y*) and Lord St. Leonards drew from it the conclusion that even if the £20,000 had been a debt of the testator, the decree in the Exchequer was erroneous.] (*z*) At all events the doctrine in the judgment is in direct opposition to that of Sir W. Grant's determination in Hancox *v.* Abbey. Upon principle the distinction taken by that learned judge, between a trust to pay particular debts and debts generally, seems to be hardly tenable. There is no apparent reason why a testator who provides an additional fund should intend to discharge the fund primarily liable, more in the one case than in the other; or why debts, which before subsist as a charge upon the personal estate independently of the will, should necessarily be considered as governed by the same rule as legacies, which owe their existence to the trust to pay them.

Charge of particular debt *previously* secured on real estate.

[It must be observed that Hancox *v.* Abbey did not depend wholly on the trust being to pay a particular debt, but partly on the fact that the debt in question was already charged on real estate, so that the trust for payment of it was either intended to make the trust fund primarily liable, or was altogether purposeless. After adverting to the general rule that a devise to sell for payment of all debts would not exonerate the personal estate, Sir W. Grant continued: "But a direction to apply a particular portion of the real estate for the payment of one particular debt affords a very different inference. Why should the testator direct

(*t*) Dan. 322, [12 Pri. 213.]

(*u*) See this treated of, *ante* p. *638.

(*x*) But in general the charging of a particular debt or legacy expressly gives it no priority over debts or legacies subsequently charged in general terms, Clark *v.* Sewell, 3 Atk. 96.

[(*y*) 12 Pri. 319, 321, 322.

(*z*) Law of Prop. 366.

exclusively a particular debt to be paid out of his real estate? It is not generally from an apprehension that the personal estate may not be sufficient for all debts, for no precaution is taken except for this particular debt; and this debt was already a charge upon the real estate. Therefore, for the security of the debt, there was no reason to direct a sale. It is no additional security to the mortgagee. For what purpose, *then, could he so specially direct a portion of the real estate to be sold, and the produce applied to that particular debt, if he intended that debt to stand just in the same predicament as any other debt, except only that it was to be charged on the real estate as it already was? Putting that aside, nothing is done by all this particularity of expression, for then this debt stands upon the same footing as all other debts." (a)

So, in Evans v. Cockeram, (b) where a testator, after devising an estate which he had mortgaged, and giving a power to raise thereout £200 for each of his two daughters, proceeded thus: "And I hereby charge and make liable my said estate for the repayment of the said sums of £200 to each of my said daughters as aforesaid, and also for the payment of any sum or sums of money on the security of my said estate at my death;" Sir J. K. Bruce, V. C., held that the mortgaged estate was primarily charged with the payment of the debt; observing that in favor of the creditor the testator could not charge the estate, or make it more liable than before.]

Charge of a particular debt with a personal obligation on devisee.

In Welby v. Rockcliffe, (c) where the testator, after devising an estate at W. to A in fee, and reciting a marriage annuity bond given by him, charged the estate, and also A, his heirs, executors and administrators with the payment of the annuity, and then disposed of the personal estate, the residuary personal estate was held to be exempt, [though there was no pre-existing charge on the real estate;] the annuity not being merely charged on the estate, but the payment being imposed on A as a personal obligation.

(a) The M. R. also adverted to the form of the gift to B, being of the "residue" of the sale moneys. How, he asked, could B claim more than was given to him? (But that argument would be equally good if the trust were to pay all debts.) Or could the heir be intended to take the benefit as so much undisposed of? (as to which see ch. XIX., § 5.)

(b) 1 Coll. 428. But see Johnson v. Milksop, 2 Vern. 112. Since L. King's acts (*ante* p. *646) the express charge is, in a case like Evans v. Cockeram, as little needed for the one purpose as for the other.]

(c) 1 R. & My. 571.

[But in Quennell *v.* Quennell, (*d*) where a testator, having on his marriage executed a bond and settlement to secure an annuity to his wife, by his will confirmed the settlement, and charged the annuity on certain real estate and stock, and subject thereto gave the estate and stock to A, and then gave the residue of his real and personal estate, subject as to his personal estate to his debts, funeral and testamentary expenses and legacies, to his wife; it was held by Lord Langdale that the testator had *only created a charge without affecting the primary liability of the personal estate.

Charge of particular debt *without* such personal obligation.

But besides the two classes of legacies already mentioned there is a third or intermediate class, where there is a separate and independent gift of the legacy, and then a particular fund or estate is pointed out as that which is to be primarily liable. (*e*) This class would seem to afford a closer analogy to charges of particular debts than legacies that are only specific. Thus in Lamphier *v.* Despard, (*f*) where a testator directed his debts and legacies to be paid by his brother, and gave to him the woods growing on his estate F. to pay his debts and legacies; then he bequeathed two legacies, which were not to be paid until five years after his death, as it was his wish that the woods should not be cut down until then; he then bequeathed the timber money after payment of the two legacies, and then gave another legacy, and appointed his brother his executor and residuary legatee: it was held by Sir E. Sugden, C. Ir., that the two legacies were payable primarily out of the produce of the timber, and that the residuary personal estate was the secondary fund for payment of them. He said "This is not a general fund provided for payment of all the legacies, but a fund only for two; and whenever there is a direction to apply a particular fund for the payment of some of the

Demonstrative legacies.

[(*d*) 13 Beav. 240.

(*e*) Per Wood, V. C., 1 H. & M. 668.] Whether legacy is demonstrative or specific.—Whether, if the particular fund fails by an act of the testator in his lifetime, the legacy is payable out of the general assets, in other words, whether the legacy is demonstrative or specific, is often a question of some nicety. As to this, see Savile *v.* Blacket, 1 P. W. 778; Att.-Gen. *v.* Parkin, Amb. 566; Cartwright *v.* Cartwright, 2 B. C. C. 114, (see two last cases cited 3 Beav. 575); Roberts *v.* Pocock, 4 Ves. 150; M'Leland *v.* Shaw, 2 Sch. & Lef. 538; Smith *v.* Fitzgerald, 3 Ves. & B. 2; Mann *v.* Copland, 2 Mad. 223; Fowler *v.* Willoughby, 2 S. & St. 354; Wilcox *v.* Rhodes, 2 Russ. 452; Colvile *v.* Middleton, 3 Beav. 570; [Sidebotham *v.* Watson, 11 Hare 170; Fream *v.* Dowling, 20 Beav. 631, L. R., 4 Eq. 145, n.; Paget *v.* Huish, 1 H. & M. 663.

(*f*) 2 D. & War. 59.

legacies, that is the primary fund for this purpose, Hancox v. Abbey."

Sir E. Sugden appears indeed to have invariably referred Sir W. Grant's decision to the distinction between a particular and a general charge. (g) On the other hand there appears to be no decision on that bare point except Quennell v. Quennell, which would seem to involve a denial of any such distinction in the case of debts.

Charge of a particular sum towards payment of debts.

The charging of an estate with a definite sum for payment of debts points more directly to making that estate the primary *fund. Personal estate fluctuates, and debts fluctuate, and in no certain ratio to each other. By what amount therefore (if any) the personalty will fail to satisfy the debts is until the testator's death quite uncertain; and to devote a fixed amount to answer this uncertain deficiency is an improbable thing to intend. In Clutterbuck v. Clutterbuck, (h) where a testator devised lands upon trust to raise a sum of £2000 for payment of certain specified debts, and all such other debts as he should owe at his decease; and on further trust out of his rents, &c., to pay divers life annuities, and "subject to the several trusts aforesaid" in trust for his wife for life, remainder to a nephew in fee; it was held by Sir J. Leach, M. R., that the sum of £2000 was the primary fund.]

Where *personal* fund is subjected to certain charges.

It should seem, that where a specific portion of *personal* estate is appropriated to charges to which the general personalty is liable, such fund is not, as in the case of land, subsidiary only, but is primarily applicable.

General personalty held to be exempt.

Thus, in Browne v. Groombridge, (i) where a testator gave to his executors his exchequer bills, money at the bankers and due to him on policies of insurance, money in the funds, and debts, upon trust thereout to pay his wife £200, and

(g) Bateman v. Earl of Roden, 1 Jo. & Lat. 369; Coote v. Coote, 3 Id. 178. In the former case the personalty was held exonerated from a debt on the ground that it was consolidated with another sum which was clearly charged on the real estate only.

(h) 1 My. & K. 15.]

(i) 4 Mad. 495. What is included in a charge of "testamentary expenses." —["Testamentary expenses" was held not to include the costs of an administration suit. But this has been otherwise determined, Harloe v. Harloe, L. R., 20 Eq. 471, and cases there cited; and Alsop v. Bell, 24 Beav. 469, and Penny v. Penny, 11 Ch. D. 440; and "executorship expenses" is synonymous, Sharp v. Lush, 10 Ch. D. 468. But such costs are not included in "debts and charges of proving the will," Stringer v. Harper, 26 Beav. 585.]

then *to pay his debts, funeral and testamentary expenses*, and, after making the said payments, to pay certain legacies, and then to stand possessed of the moneys upon certain trusts; it was contended, on the authority of Waring *v.* Ward, and Noel *v.* Lord Henley, that the specific fund was charged with the debts and legacies only in aid of the personal estate; but Sir J. Leach, V. C., held that the fund was immediately liable, observing that Waring *v.* Ward was the case of a devisee of *real* estate, who was entitled to the aid of the personal estate.

So, in Choat *v.* Yeates, (*k*) where a testatrix gave the residue of her *funded property*, after payment of her *just debts, legacies, funeral and testamentary expenses*, to A, and all the residue of her personal estate upon certain trusts; it was held that the *funded property was primarily liable, though the effect was to leave nothing for the legatee.

Again, in Bootle *v.* Blundell (*l*) we have seen that the direction to pay the funeral expenses and certain legacies out of a specified fund was treated by Lord Eldon as tantamount to a declaration that they should not be paid out of the general personal estate.

The doctrine of these authorities seems upon the whole to be reasonable; for, although, where a testator subjects real estate to charges to which the personal estate, and most frequently that only, was before liable, there is no reason why the added fund should be applied before the original one, yet in regard to personal property, the whole of which was antecedently applicable to debts, as additional security to the creditor could not be the object of the provision, the natural inference is, that the testator, in appropriating for this purpose a particular portion of that estate, intended that it should be primarily applied.

Different rule where residue not disposed of.

[But the doctrine does not apply where the residue remains undisposed of, in which case it will be primarily liable. (*m*)

Charge on a particular fund, and exemption of the others, do not

Where one particular fund is appropriated for payment of debts and the testator's other property is exempted, such other property still remains liable in its proper order for any deficiency, the exemption not having the effect of altering

(*k*) 1 J. & W. 102; [and see Evans *v.* Evans, 17 Sim. 106; Phillips *v.* Eastwood, 1 Ll. & G. 294; Webb *v.* De Beauvoisin, 31 Beav. 573; Vernon *v.* Earl Manvers, Id. 623.]

(*l*) 1 Mer. 193, *ante* p. *670.

[(*m*) Holford *v.* Wood, 4 Ves. 78; Hewett *v.* Snare, 1 De G. & S. 333; Newbegin *v.* Bell, 23 Beav. 386. And see *ante* p. *673.

alter liability of others *inter se.*

the liabilities of the several species of exempted property *inter se.* Thus, in Lord Brooke *v.* Earl of Warwick, (*n*) the testator devised real estates in mortgage and bequeathed specific parts of his personal estate and also the residue of his personal estate "freed and discharged from debts," &c., and devised an estate to be sold and the money to be applied to pay his debts, &c. The money arising from the sale proving insufficient for the purpose, it was contended that the gift of the residue was in the nature of a specific gift, and there being the same expressed intention to exonerate the residue as the mortgaged estates from debts, the devisees of the latter ought to take *cum onere;* but Lord Cottenham, C., affirming the decision of Sir J. K. Bruce, V. C., held that the residue was primarily liable. The V. C. said he could conceive a case in which a residuary bequest might stand on an equal footing with particular or specific legacies; but here he thought the testator meant no more than that the property expressly given *in trust for payment of the debts should be the only fund or the first fund for their payment. The L. C. approved of the V. C.'s construction, and said both the mortgaged estate and the residue were intended by the testator to be freed from the debts (referring particularly to the passage cited above); but that he could not give the residue discharged from debts unless he provided for them out of some other fund.

Secus, where part only of the others is exempted.

But where all the personalty is bequeathed in terms expressly exempting it from payment of the usual charges affecting it, this exemption throws those charges on all other property not expressly exempted, so that, for instance, in case of a deficiency in the produce of lands devised to answer such charges, they would fall upon other lands specifically devised. (*o*) And in Powell *v.* Riley, (*p*) where the exemption of the personal estate was not express, but was inferred from its being given as a specific legacy, and where the property expressly given for payment of the debts, funeral and testamentary expenses proved insufficient, the personal estate was held liable to pay only a proportion of the deficit *pari passu* with specifically devised lands. This is the case contemplated by Sir K. Bruce in Lord Brooke *v.* Earl of Warwick, which, however, was not cited.]

(*n*) 2 De G. & S. 425, affirmed 1 H. & Tw. 142.

(*o*) Morrow *v.* Bush, 1 Cox 185; Young *v.* Young, 26 Beav. 522.

(*p*) L. R., 12 Eq. 175.]

IV. It remains to consider in what cases assets are marshaled in favor of legatees or creditors.[17]

Marshaling of assets.

17. By "marshaling assets" we are to understand such an arranging of the different funds to be administered as that they may, as far as possible without injustice, be applied to the satisfaction of all the various claims, although certain parties may be entitled to prior satisfaction out of some one or more funds. And, therefore, if there are two or more funds, and several claimants, one or more of whom can resort to all or many of such funds, and others who can resort to one only, a court of equity will either compel the former to proceed against the fund, against which the latter cannot, so far as it will extend, or will make compensation to the latter out of the fund, in proportion to what the former has needlessly taken from the fund which formed the only means of payment for the latter. See Theobald on Wills 463; Rice *v.* Harbeson, 63 N. Y. 493.

In Post *v.* Mackall, 3 Bland Ch. 486, 516, Bland, C., says: "The marshaling of different funds among creditors, is not, however, founded on any such equity or implied contract between debtors; but rests upon a natural and moral equity; that no one ought to be permitted, at his mere will, to derive a benefit from that which must injure another; and that equality is equity, provided the court has any foundation for enforcing such equity without depriving a party of his clear legal rights, or impairing the obligation of his contract."

The rule of marshaling assets must be so applied as to protect, and not to destroy, equities, Southworth *v.* Parker, 41 Mich. 198.

It was said by Miller, J., in Rice *v.* Harbeson, 63 N. Y. 493, 498: "This power is frequently exercised by the courts to protect the rights of parties and to do justice between them, and it is eminently proper to invoke its aid where, as in this case, a different rule must inevitably tend to defeat the claim of most of the legatees under the testator's will."

A testator has the right to prescribe a law for the disposition of his estate; therefore the inquiry always is, has the testator expressed an intention to have his assets marshaled in a different manner from that prescribed by law, Brown *v.* James, 3 Strobh. Eq. 24.

In Elliott *v.* Carter, 9 Gratt. 541, 551, it was said by Lee, J.: "The principle which lies at the foundation of the right of a legatee or devisee to marshal the assets, is, as has been intimated, the presumed intention or inclination of the testator in his favor. But where, as in the case now in judgment, the testator has charged his whole estate, as well the real property devised as the personal bequeathed, with the payment of his debts, there can be no stronger presumption of an inclination in favor of the devisee than of the legatee, both being equally the objects of the testator's bounty; and between persons so taking, equity will not interfere unless the testator has shown clearly some ground of preference or priority of the one over the other. 1 Story's Eq. Jur., § 565. And if in such a case the property, other than that specifically devised and bequeathed, prove inadequate to meet the charge, it should seem that equity to supply the deficiency, would apply its maxim that equality is equity, and levy it equally and ratably upon the property so devised and bequeathed. The principle of contribution in such a case for the purpose of meeting the common charge resting alike upon the different subjects of property disposed of among the several objects of the testator's bounty, is dictated by a plain and obvious rule of justice, and is, I think, fully sanctioned by authority."

In marshaling assets, legacies charged

On this subject it may be stated as a general rule, that wherever a creditor, having more than one fund, resorts to that which, as between the debtor's own representatives, is not primarily liable, the person whose fund is so taken out of its proper order is entitled to be placed

on land are considered as land, McCampbell *v.* McCampbell, 5 Litt. 97. Where personal property is to be converted into real property by direction of the testator, it will be considered as such in marshaling assets, and will be liable for debts only after specific bequests of personalty, Downing *v.* Marshall, 1 Abb. App. Dec. 525.

Where an annuity is charged on both real and personal property, and there are legacies besides, but no devises, the personal property is first liable, if sufficient for annuity and legacies; but if not, the assets will be marshaled, and the legatees subrogated to the rights of the annuitant against the real property, if the annuity has been paid out of the personalty, Allen *v.* Allen, 3 Wall., Jr., C. C. 289. And where a testator authorizes any of his lands to be sold for the payment of his debts, and devised lands are so applied before the personal property, devisees and their judgment creditors may be subrogated to the rights of the creditors against the personalty, Morris *v.* Mowatt, 2 Paige 586.

Where real property is devised to a trustee for the use of the testator's widow for life, and after her death to the grandchildren of the testator, the widow cannot demand that a part of the *corpus* of the estate be sold to pay debts, in order that she may enjoy all the rents of the leaseholds, Merryman *v.* Long, 49 Md. 540. In such case, the rents of the leaseholds are assets in the hands of the executor for the payment of debts, Id. So, too, the hire of slaves, or interest on a bond, Edelen *v.* State, 4 Gill & J. 277.

As between a legatee for life and creditors of the estate, the latter have the right to insist that their debts be paid out of income of the estate, before any part thereof be paid to the legatee, Merryman *v.* Long, *ubi supra.*

The assent of an executor to a legacy can never defeat the right of a creditor to pursue, in a court of equity, the assets of a testator, in the hands of a legatee, if necessary for the payment of testator's debts, Dunn *v.* Amey, 1 Leigh 465.

A legacy charged on lands, and given to trustees to hold until the legatee should attain her majority, retains preference over a mortgage given on part of said land, which was released, without consideration, by the guardian of the legatee, with the advice of the attorney of the mortgagee, Blauvelt *v.* Van Winkle, 2 Stew. (N. J.) 111. In marshaling the assets of the estate, debts due from the testatrix must have priority over such legacy, Id.

Unless otherwise ordered by the will, general legacies will be taken for the payment of debts before specific legacies, Shaw *v.* McBride, 3 Jones Eq. 173; and the legacies of personal property will be taken before those of real estate, Id.

Previous to the code of 1849, in Virginia, a judgment against a deceased person had priority over debts by simple contract. Such judgment was also to be paid out of personal assets, if such assets should be sufficient for the purpose. Where such a judgment had been paid out of personalty, the simple contract creditors did not, on that account, acquire a right to have the assets marshalled, and to have their debts paid *pro tanto* out of the realty, Pugh *v.* Russell, 27 Gratt. 789. Nor will a simple contract creditor have the right to have the assets marshaled, because taxes due the state have been paid out of the personalty, Id.

The ordinary rule of marshaling assets is not to be disturbed because lands are

in the same situation as if the assets had been applied in a due course of administration; in other words, to occupy the position of the creditor in respect of that fund or those funds which ought to have been applied, to the extent to which his own has been exhausted.

In favor of legatees against the heir.

Thus, if the specialty creditors of a testator who died before the 29th of August, 1833, (q) or the simple contract creditors of any other testator, choose to enforce payment from the personal representatives of their debtor, instead of suing

devised subject to a mortgage thereon, Estate of Woodworth, 31 Cal. 595.

Where a testator died, leaving a widow, a daughter, and three sons, T., J. and M., and devised the use of a lot (1) to his widow, *durante viduitate*, with remainder to T., subject to a legacy of $1000 to J., payable in five years after the death of the widow, and gave to J., besides the $1000, another legacy of $4000, charged on a lot (2) devised to M., and payable in five or ten years, at M.'s option; he also gave to M. a lot (2) subject to the legacy as aforesaid, and also a lot (3), and the residue of his estate to be applied to certain religious purposes. J. died after the testator, and without having received his legacies. The testator's personalty was not sufficient to pay his debts, including the costs of a litigation to establish the will, directed to be paid out of the estate, and lot 2 was ordered to be sold for that purpose. The widow, in her own right and also as administratrix of J., filed a bill for relief against that order. It was held by Runyon, C., that the debts must be charged upon the residuary interest of T. in lot 1, and on M.'s interest in lots 3 and 2, in the relative proportion which the value of each lot bore to the amount of debts due, and in selling the lots of M., number 3 must be first resorted to, and if T.'s remainder did not satisfy his proportion of the debts, the balance must be made out of M.'s property, and *vice versa;* and that the remainder, if any, arising from the sales of the several lots, would be subject to the legacies charged on the respective lots, Martin *v.* Cullen, 3 Stew. (N. J.) 426.

It seems that by the administration laws of Missouri, the marshaling of assets in equity has been done away with, and all claims against the estate of a decedent must be classified into one of six classes, and that no debt of a subsequent class can be paid until all those of preceding classes are satisfied, Titterington *v.* Hooker, 58 Mo. 593. In this case, at page 597, it is said by Hough, J.: "We are of opinion that the precise and simple yet effective provisions of our administration law, whereby the whole estate of a decedent, both real and personal, may be subjected to the payment of his debts, were designed to entirely supersede the more cumbrous machinery of the common law, and that the whole doctrine of equitable assets, marshaling assets in equity for the payment of debts, and bills for the discovery of assets and account, is without application here, save in so far as the principles underlying those proceedings may be invoked in illustration or explanation of analogous remedies afforded by our statute." See, too, Jillett *v.* Union National Bank, 56 Mo. 304. And the same rule of law seems to prevail in Iowa, Hart *v.* Jewett, 11 Iowa 276; Brewster *v.* Kendrick, 17 Id. 479; Noble *v.* Morrey, 19 Id. 509; Willcox *v.* Jackson, 51 Id. 296. And when there are not assets sufficient

(q) See stat. 3 and 4 Will. IV., c. 104, *ante* p. *583.

(as they may do) the heir in respect of any real estate which may have descended to him, and thereby withdraw the personalty *from the claim of specific or pecuniary legatees, the courts will marshal the assets in favor of such legatees, by placing them in the room of the creditors, as it respects their claim on the descended lands; such descended assets, according to the order of application before stated, being liable before personalty specifically bequeathed, or even pecuniary legacies. (r) 18

to pay all the debts of any one class, the debts of that class are paid ratably, Hart v. Jewett, *ubi supra*.

See also preceding notes to this chapter, where the various doctrines comprised under the general doctrine of marshaling assets are treated of under their respective heads.

(r) See *ante* p. *622.

18. "Thus, legatees may stand against descended realty, or against realty charged with debts, if the personalty has been exhausted in payment of debts. Foster v. Cook, 3 B. C. C. 347; Paterson v. Scott, 1 D., M. & G. 531; Rickard v. Barrett, 3 K. & J. 289." Theobald on Wills 463. Durham v. Rhodes, 23 Md. 233; Dugan v. Hollins, 11 Id. 41; Mitchell v. Mitchell, 21 Id. 244; Brooks v. Dent, 1 Md. Ch. Dec. 523; Stires v. Stires, 1 Halst. Ch. 224; Livingston v. Newkirk, 3 Johns. Ch. 312. Where a testator directed that his real and personal property should be kept together, under the management of his executor, "*until his just debts be paid,*" and disposed of the same thereafter, and subsequently to the execution of his will purchased land, (which descended to the heir,) and mortgaged such land for the purchase money; it was held that, as between the heir and legatee, the property passing under the will was the primary fund for the payment of debts, including the debt for which the after-acquired real estate was mortgaged, Ford v. Gaithur, 2 Rich. Eq. 270. "It is a general rule that any fund, which is not disposed of by a testator, shall be applied to the payment of debts before property, which is given by the will, can be subjected; in other words, a legatee is preferred to those claiming an undisposed-of residue, for he is an object of the testator's bounty, whereas they take by act of law, simply because, as it is not given away, and there are no debts to which it can be applied, such residue would otherwise be without an owner, or remain in the hands of the executor," Pearson, C. J., in Wynns v. Burden, 5 Jones Eq. 377, 378. So, too, Elliott v. Posten, 4 Id. 433. Where a testator died bequeathing his slaves to his wife, and requesting that none of them be sold to pay his debts, but that all his debts be paid from his other personal estate, and his widow afterwards died leaving a will, by which she manumitted the slaves, it was held that the executors of the widow could not restrain the administrators of her husband, by injunction, from selling the negroes for payment of his debts. And that this did not prevent a case of contribution and marshaling of assets between *different* devisees and legatees, the widow being both specific devisee and legatee and residuary devisee and legatee, Magruder v. Carroll, 4 Md. 335. Where a testator left lands and a sufficiency of personal estate to pay debts, but afterwards, by the emancipation of his slaves, the personal property became insufficient, it was held that as between the claimants of the money legacies and the devisees the loss must fall upon the legatees, Johnson v. Farrell, 64 N. C. 266.

But [pecuniary] legatees are not entitled to have the assets marshaled against the *devisees* of real estate either specific or residuary, (*s*) for to throw the debts upon the devisees in such a case, would be to apply devised *real* estate before personal estate [not] specifically bequeathed, and thereby break in upon the established order of application before stated. (*t*) It is not correct in such cases to account for the non-interference of the court by saying that the parties have *equal equities*, (*u*) which would seem to imply that there exists such an equality between them in the consideration of a court of equity, as to entitle neither party to its interposition against the other; whereas it is clear that if the *devised* lands had been resorted to by any creditor, having no specific lien thereon, instead of the personal estate, the devisee would have been entitled to be reimbursed out of [the pecuniary legacies.] The reason, therefore, and the only reason, why assets are not marshaled in the case under consideration is, that the creditor having resorted to the fund *in the proper order*, no ground exists for disturbing it.

But not against devisees.

But if the lands devised are *charged with debts*, it is clear, upon the same principle, that the assets will be marshaled in favor of pecuniary and specific legatees; lands so charged being applicable before pecuniary or specific legacies. (*x*) Thus, in Foster *v.* Cook, (*y*) (where a testator had charged his real estate with his *debts*, and given legacies not so charged,) the creditors having been paid out of the personal estate, which was not *sufficient to pay both them and the legatees, the latter were allowed to come upon the real estate so far as it had been applied in payment of debts; [and this decision has been recognized in later times.] (*z*)

Unless lands are charged with debts.

(*s*) Mirehouse *v.* Scaife, 2 My. & Cr. 695; Forrester *v.* Leigh, Amb. 171; Scott *v.* Scott, Amb. 383, 1 Ed. 458; Hamly *v.* Fisher, Dick. 105, [Amb. 127 (Hanby *v.* Roberts)]; Keeling *v.* Brown, 5 Ves. 359. Mr. Roper has treated this case as if the specialty debts had been charged upon the land by the testator, 1 Treat. on Leg. 463; although Lord Alvanley distinctly determined that none of the debts were charged, (see *ante*,) and grounded his refusal to marshal the assets on this circumstance.

(*t*) *Ante* p. *622.

(*u*) See 1 Rop. on Leg. 469.

(*x*) *Ante* p. *622.

(*y*) 3 B. C. C. 347. See also Bradford *v.* Foley, Rolls, 14 Aug., 1791, 3 B. C. C. 351, n.; Webster *v.* Alsop, Rolls, 12 July, 1791, 3 B. C. C. 352, n.; Fenhoulett *v.* Passavant, Dick. 253; Lord Hardwicke's judgment in Arnold *v.* Chapman, 1 Ves. 110; Norman *v.* Morrell, 4 Ves. 769; Aldrich *v.* Cooper, 8 Ves. 396; [from which last case it also appears that the rule as to the widow's paraphernalia is the same. Probert *v.* Clifford, Amb. 6, as corrected in note by Blunt, is not *contra*; and see] Snelson *v.* Corbet, 3 Atk. 368.

[(*z*) Paterson *v.* Scott, 1 D., M. & G.

Assets marshaled against devisees, &c., of mortgaged lands.

So, if the mortgagee of a devised or descended estate resort in the first instance (as he clearly may) to the personal estate of the deceased mortgagor, to the prejudice of specific or even of general pecuniary legatees (who, it will be remembered, are not liable to exonerate a devised or descended mortgaged estate, (a) equity will give those legatees a claim on the estate to the extent to which their funds may have been applied in its exoneration. (b) [19]

In Wythe v. Henniker, (c) an attempt was made, by impungning the authority of Forrester v. Leigh, to shake this doctrine in regard to pecuniary legatees; but Sir J. Leach, M. R., adhered to it, observing that since that case he had always considered it to be a settled rule of courts of equity that a pecuniary legatee is entitled to stand upon the devised estate in the place of the mortgagee, to the extent to which the mortgage has been satisfied out of the personal estate. That doctrine proceeded upon the assumption that the devise of the mortgaged estate is a devise of the equity of redemption only, and that the testator intended that the devisee should take the estate *cum onere*. That doctrine, his Honor, however, observed, has not been universally approved, because in all other cases the devisee of a mortgaged estate does not take it *cum onere*, but has a right to have the mortgage satisfied out of the personal estate, even where the devise is made expressly subject to the mortgage.

Rule as to vendor's lien for purchase money.

It has been much debated whether, where a vendor, who has an equitable lien for his purchase money on the property, as well as a claim on the personal estate of the deceased purchaser, resorts to the latter, to the prejudice of specific or pecuniary legatees, the legatees are entitled to have the assets marshaled against the heir or devisee of such property.

Question between legatees and heir.

In regard to the heir, it would seem clear upon principle, and by analogy to the case of a descended mortgaged estate, that in such a case the courts would marshal the assets in favor of the legatees; descended assets being, according to the order *before stated, applicable before specific or pecuniary legacies to the payment of all charges affecting them both.

531. Here was a trust to sell and pay debts; but a mere charge is equivalent, Rickard v. Barrett, 3 K. & J. 289; Surtees v. Parkin, 19 Beav. 406.]

(a) *Vide ante* p. *636.

(b) Lutkins v. Leigh, Cas. temp. Talb. 53; Forrester v. Lord Leigh, Amb. 171; [Johnson v. Child, 4 Hare 87.]

19. Theobald on Wills 463.

(c) 2 My. & K. 635.

And this view of the case seems to agree with Lord Eldon's observation in Austen *v.* Halsey, (*d*) where, however, the land was devised, and his opinion upon another question rendered it unnecessary to decide the point. A contrary determination, indeed, was made in Coppin *v.* Coppin, (*e*) where a person, who was both heir and executor of his brother, was held to be entitled to retain out of the personal assets the purchase money of an estate which his brother had purchased from him, against the legatees of the brother. This case has been questioned by Lord Eldon, (*f*) and seems to have been overturned by Trimmer *v.* Bayne, (*g*) where Sir W. Grant decided that the heir who had paid the purchase money for an estate contracted for by his ancestor was not entitled, as against the legatees of such ancestor, to be reimbursed out of his personal estate. It is not distinctly stated, however, whether the legatees out of whose bequests the heir unsuccessfully claimed to be reimbursed were specific or pecuniary legatees.

The right of a pecuniary legatee to have the assets marshaled as against the heir of a testator who purchased, but died without having paid for, an estate, is placed beyond all doubt by Sproule *v.* Prior. (*h*)

Where the purchased estate is *devised*, the question is somewhat different; but as the established rule is, we have seen, that the devisee of a mortgaged estate is not entitled to exoneration out of personal estate specifically bequeathed, and not expressly made subject to debts, there seemed ground to contend that in the present case the estate must, by parity of reasoning, also bear its own burden against such legatees, and accordingly, that if their funds have been taken by the vendor, they are entitled to have the assets marshaled against the devisee.

Question between legatees and devisee of contracted-for estate.

And Pollexfen *v.* Moore (*i*) was considered to lend some countenance to this doctrine; but it appears to have been decided upon different, though it should seem untenable, grounds. Sir W. Grant, in Trimmer *v.* Bayne, (*k*) intimated that the case had greatly perplexed him, and the eminent author of the Treatise *of Vendors and Purchasers has taken some pains to show the inapplicability of the decision to the

(*d*) 6 Ves. 484.

(*e*) Sel. Ch. Cas. 28, 2 P. W. 291.

(*f*) See his judgment in Mackreth *v.* Symmons, 15 Ves. 339.

(*g*) 9 Ves. 209, 4 Russ. 339, n.

(*h*) 8 Sim. 189.

(*i*) 3 Atk. 272, stated from R. L., Sugd. V. & P. [874, (11th ed.,) and see 679, n., (14th ed.)] Some of the doctrine advanced in this case is at variance with the decision. See 9 Ves. 211; 15 Ves. 339.

(*k*) 9 Ves. 211.

doctrine which it has been advanced to support, and the unsoundness of that doctrine; and his high authority may have had some weight in procuring its overthrow in Wythe *v.* Henniker, (*l*) where Sir J. Leach, M. R., held that a person having devised an estate which he had purchased, and the vendor having after his decease been paid a part of the purchase money, which remained unpaid at the testator's death, out of the deceased's personal estate, the pecuniary legatees had no right to stand in the place of the vendor in respect of his lien upon the purchased estate, to the extent of the sum so received. His Honor, however, appears to have contented himself with showing that Pollexfen *v.* Moore (which had been cited on behalf of the legatees) was not applicable to the point, and we look in vain throughout his judgment for an explanation of the principle of his decision, or an answer to the plausible, if not convincing, arguments founded upon analogical reasoning from the cases by which the claim of the legatees was attempted to be sustained. [In Lord Lilford *v.* Powys-Keck (*m*) it was held by Sir J. Romilly that the distinction between a mortgage and a vendor's lien was untenable, and that pecuniary legatees were entitled to marshal against the devisee in the one case as well as in the other. And since land in mortgage or subject to a vendor's lien is now primarily liable to the satisfaction of those charges, residuary legatees and next of kin have in both cases a similar right.] (*n*) [20]

Pecuniary legatees not entitled to marshal, as against devisee of contracted-for estate, in respect of unpaid purchase money.

Effect of L. King's acts.

Sir W. Grant decided that even where the testator expressly directed his executors to pay the purchase money of the devised estate and the personal estate was inadequate to pay both the purchase money and the pecuniary legacies, the devisee was liable to contribute ratably with the legatees. (*o*)

It may be observed that Lord Eldon in Austen *v.* Halsey (*p*) thought that a clause, giving the executors "power" to pay the purchase money out of the personal estate, was not necessarily to be construed as an absolute direction.

(*l*) 2 My. & K. 635. [But before 3 and 4 Will. IV., c. 104, assets were marshaled against the devisee, in favor of simple contract creditors, Selby *v.* Selby, 4 Russ. 336.]

(*m*) L. R., 1 Eq. 347. See also Birds *v.* Askey, 24 Beav. 618.

[(*n*) See L. King's acts, *sup.* pp. *646, *648.]

20. Theobald on Wills 463.

(*o*) Headley *v.* Readhead, Coop. 50, noticed *ante* p. *622, n.

(*p*) 6 Ves. 478.

Marshaling, where one party has several funds, and another one only.

The preceding cases, however, in which equity interferes to prevent an eventual derangement, by the act of third persons, of *the order of applying the assets, do not completely exemplify an important principle by which the courts, in marshaling assets, are governed, and which forms the peculiar feature of the doctrine; it is this, that wherever a party has a claim upon one fund only, and another upon more than one, the party having several funds must resort, in the first instance, to that on which the other has no claim; or, in other words, the court will so arrange the funds as to let in as large a number of claims as possible, (q) and if the person having the several funds should, in violation of this rule, have resorted to the fund common to himself and the person having no other fund, the court will place that person in his room, to the extent to which the common fund has been so applied. (r) 21

[(q) "The interest of the debtor shall not be regarded," per Lord Eldon, Aldrich v. Cooper, 8 Ves. 391. But the principle will not be applied to the prejudice of third persons, Dolphin v. Aylward, L. R., 4 H. L. 486.]

(r) See this doctrine referred to in regard to charities, *ante* vol. I., p. *234.

21. Durham v. Rhodes, 23 Md. 233; Post v. Mackall, 3 Bland Ch. 486, 502; Pugh v. Russell, 27 Gratt. 789; Southworth v. Parker, 41 Mich. 198; Cooper v. Bigly, 13 Id. 463. Where there is a fund common to *both* of two charges, and a fund subject only to *one* of them, upon a well-settled principle of equity, this separate fund must be applied in aid of the common fund, Graves v. Howard, 3 Jones Eq. 302.

In Post v. Mackall, 3 Bland Ch. 486, 502, Bland, C., says: "Where one creditor may, to obtain satisfaction, have recourse to two funds, and another creditor of the same debtor can only resort to one of them; he who has it in his power to resort to the two funds may be compelled to obtain satisfaction, as far as he can, out of that fund upon which the other creditors can have no claim, so as to leave the other fund for their satisfaction. The principle upon which this arrangement is made is not deduced from that which may properly be considered as the contract between debtor and creditor, but is founded on a natural and moral equity, that it shall not depend upon the will or caprice of one creditor who has within his reach a double fund to disappoint another creditor of his satisfaction. And this principle has been applied in all such cases, as well under the peculiar circumstances in the lifetime as after the death of the debtor. A mere bounty of the testator enables the legatee to call for this species of marshaling; that if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not. So that wherever there is a double fund, though this court will not restrain a party, yet he shall not so operate his payment as to disappoint another claim, whether arising by the law, or by the act of the testator.

"But in making this arrangement great care must be taken not to lessen or impair, in any manner whatever, the obligation of the creditor's contract. It can only be made where all the parties are before the court, and the whole subject is within its jurisdiction; and where it is clear, that

This principle is applied in favor of both creditors and legatees. (s) In regard to the former, however, it is to be remembered that the statute of 3 and 4 Will. IV., c. 104, (t) renders all real estate, including copyholds, liable to the claims of creditors of every class, [and that stat. 32 and 33 Vict., c. 46, places specialty and simple contract creditors on an equal footing.]

Effect of stats. 3 and 4 Will. IV., c. 104, and 32 and 33 Vict., c. 46, upon the doctrine.

The doctrine will therefore seldom be called into operation in reference to creditors. But it is observable that the former statute, by widening the range of the claims of creditors, has given greater scope to the application of the doctrine among legatees. Thus, as it was formerly the rule that where a specialty creditor resorted to the personal estate, and thereby rendered it inadequate to the payment of pecuniary legacies, the legatees might claim to stand in his place in respect of his demand upon the realty, which had descended or was charged with debts; so it is equally clear that, under the existing law, the same consequence would follow in the case of a simple contract creditor taking such a course. (u)

Upon the same principle it is settled that where there are *two classes of legatees, the one having a charge upon real estate, the other having no such charge, and the personalty is not sufficient to satisfy both, the legatees whose legacies are so charged shall be paid out of the land, in order to leave the personal estate for those who have no other fund.

Marshaling among legatees.

the creditor can sustain no loss, nor be in any way delayed, or have his claim subjected to any additional peril. For if the parties have not been all brought before the court; or if they cannot be brought before it; because of their not having any such privity of interest as will warrant the making of them parties to the same suit; or if the two funds cannot be embraced within the scope of the same suit; and much more so, if they be not both of them within the jurisdiction of the court, it would be utterly impracticable to make any such arrangement in favor of any one set of creditors against another, the security of whose claim may be thus greatly endangered, and the satisfaction of which must necessarily be delayed and consequently lessened."

[(s) In Chapman v. Esgar, 1 Sm. & G. 575, a testator made his will before 1838, charging his real estate with debts, then purchased other real estates and died, and it was held that specialty creditors claiming the benefit of the charge in the will must allow the descended estates to be brought into hotchpot.]

(t) *Ante* p. *583.

[(u) Where there was delay in payment of the simple contract creditors, they were held not entitled to stand in the place of the specialty creditors to the extent of the interest which would have accrued due on the specialty debts, but only to the extent of the principal, Cradock v. Piper, 15 Sim. 301.]

Thus, in Hanby *v.* Roberts, (*x*) where the testator by his will gave several legacies (not charging them upon the real estate), and by codicil bequeathed a legacy of £3000, *with the payment of which he charged his real estate;* the personal estate having been exhausted in the payment of the £3000 legacy, Lord Hardwicke held that the other pecuniary legatees should stand in the place of the satisfied legatee to this extent.

Exception where legacy, as a charge upon the land, failed.

But in Prowse *v.* Abingdon, (*y*) Lord Hardwicke refused to marshal assets in favor of a legatee whose legacy had been originally charged upon the land, but had failed in respect of the real estate, by his death before the time of payment; (*z*) his lordship observing that the rule as to marshaling would hold only where it was proper to be done at the time the legacy first took place, and not where it was owing to a fact which happened subsequently to the death of the testator; (*a*) and this has been since followed in Pearce *v.* Loman. (*b*)

(*x*) Amb. 127, 2 Coll. 512, Dick. 104. See also Masters *v.* Masters, 1 P. W. 421; Bligh *v.* Earl of Darnley, 2 P. W. 620; Norman *v.* Morrell, 4 Ves. 769; Bonner *v.* Bonner, 13 Ves. 383; [Scales *v.* Collins, 9 Hare 656.]

(*y*) 1 Atk. 482.

(*z*) As to this doctrine, see *ante* vol. I., p. *834; but see also Pearce *v.* Loman, 3 Ves. 135, where Lord Loughborough doubted whether in such a case the legacy was payable even out of the personal estate. It is not easy, however, to perceive upon what sound principle the circumstance of its having been charged upon the real estate as the auxiliary fund, and having failed as to that, should vary the construction of it as a personal legacy.

(*a*) But is it not always the fact of some legatee or creditor resorting to a particular fund *after the death of the testator* that occasions the requisition to marshal?

(*b*) 3 Ves. 135.

*CHAPTER XLVII.

LIMITATIONS TO SURVIVORS.

I. *On construing* Survivor *as synonymous with* other.
II. *Whether accruing Shares are subject to Clause of Accruer.—Whether Qualifications affecting original Shares extend to accruing Shares.*
III. *Words of Survivorship, to what Period referable.*

"Survivor" when construed *other*.

I.—Whether the word "survivor" is to receive a construction accordant with its strict and proper acceptation, or is, by a liberal interpretation, to be changed into *other*, is a point which has been often discussed and variously decided.[1] On more than one occasion expressions have fallen from eminent judges calculated to create an impression that the term "survivor" might by its own inherent force, and without one single ray of light from the surrounding context, be read as synonymous with *other*. In particular Sir W. Grant in Barlow *v.* Salter (*a*) seems to have assumed

1. In Wheeler *v.* Allen, 54 Me. 232, under a devise to the children of A and B, and the heirs of their bodies, and if either die without issue, to *those who survive*, and the heirs of their bodies respectively, the words were construed to mean *others*, and the children of a deceased child of A took at the death of another child of A. See also Wms. Ex'rs (6th Am. ed.) 1576; Clark *v.* Baker, 3 Serg. & R. 478; Lapsley *v.* Lapsley, 9 Penna. St. 130; Harris *v.* Berry, 7 Bush 114; Birney *v.* Richardson, 5 Dana 429; Lowry *v.* O'Bryan, 4 Rich. Eq. 262; Gregory *v.* Beasley, 1 Ired. Eq. 25; Turner *v.* Withers, 23 Md. 18; Dickinson *v.* Hoomes, 1 Gratt. 302; Spruill *v.* Moore, 5 Ired. Eq. 284; Yates *v.* Mitchell, 1 Rich. Eq. 265; Dehay *v.* Porcher, Id. 266. And see Williamson *v.* Chamberlain, 2 Stockt. 373, where a devise to the testator's wife for life, with remainder to children, and if they die without issue, to the survivors, was construed to mean survivors at the wife's death. In another sense, in Ingram *v.* Girard, 1 Houst. 286, the meaning of others was given to the word surviving, there being a legacy to grandchildren that may be born between the date of the will and testator's death, and if any die without issue, "to his surviving brothers and sisters," and only the other brothers and sisters who answered the original description of granchildren born within the prescribed time being allowed to take.

(*a*) 17 Ves. 479.

this point; and the construction recommends itself so forcibly, as carrying into effect the probable intention of testators, and as supplying a defect or inaccuracy of expression very commonly to be found in testamentary instruments, that it appears to have obtained too ready an acceptance in the profession; for we are now taught by a series of decisions, which outweigh any opposing *dicta* or opinions, that the word "survivor," like every other term, when unexplained by other parts of the will, is to be interpreted according to its strict and literal meaning.

Word "survivors" construed strictly, not as *other*.

Thus, in Ferguson *v.* Dunbar, (*b*) where a testator gave to his executors so much of his personal estate as would purchase an annuity of £550, which he gave to his wife for life, and he directed the principal, after her decease, to be paid to his children, that is to say, one-half to his son G., and one-half to his daughters E. and C., if living at the death of their mother; and if any of them should die in the lifetime of their mother, leaving issue, he gave that share to the issue of such child or children equally, *at the age of twenty-one years or day of marriage; but if any of them should die before the age of twenty-one years without issue, he gave that share to the *survivors;* and if all of them should die without leaving children, the same was to fall into the residue. The mother died: then C. died leaving children. E. afterwards died under twenty-one, and without issue. The question was, whether the children of C. were entitled to any part of the share of *E.* Lord Thurlow said that this was one of those cases in which he had the mortification to see that what was most probably the testator's intention could not be executed, for want of his having been properly advised, and having sufficiently explained himself; that he thought the testator meant the children should take the share which would have accrued to the parent if living; but not having said so, but limited such share to the survivors or survivor, he must declare G., as the only surviving child, entitled to the whole of E.'s share, and decreed accordingly.

Gift to *survivors and survivor* confined to persons in existence.

So, in Milsom *v.* Awdry, (*c*) where a testator bequeathed the residue of his personal estate to trustees, upon trust to pay and apply the same to and among his nephews and nieces (the sons and daughters of his late brothers and sister M., D. and H.) equally between them for their lives, the children

(*b*) 3 B. C. C. 468, n.

(*c*) 5 Ves. 465. See also Wollen *v.* Andrews, 9 J. B. Moo. 248, 2 Bing. 126.

of such of them his said brothers and sister to have only their father's or mother's share; and after the death of either of the testator's said nephews and nieces, in trust to call in the share of the principal money out of which the said interest was to be paid, and pay it equally unto and among the children of such of his said nephews and nieces as should happen to die; and if any of his (the testator's) said nephews and nieces should die without leaving any child or children, then the share or shares of him, her or them so dying should go to and among *the survivors and survivor* of them in manner aforesaid. One nephew died without leaving issue; then another died leaving issue; a third then died without issue, leaving a sole survivor. Sir R. P. Arden, M. R., after much hesitation, decided that the share of the third belonged exclusively to the survivor, and was not divisible (as had been contended by the issue of the second) between him and such issue.

So, in Davidson *v.* Dallas, (*d*) where a testator bequeathed to the children of his brother R. D. £3000, to be equally divided *among them, and if either of them should die before the age of twenty-one years their shares to go to the *survivors.* Lord Eldon, after referring to the rule for construing "survivors" as importing *others*, observed that there was nothing in this will indicating a general intention upon which the forced construction of the term "survivors" had been adopted. The words must therefore have their natural meaning.

Remark on Davidson *v.* Dallas.

[Here the contention was that "survivors" should be read "others," not as in the former (which are the more common) cases, in order to include children who had previously died: but in order to include children who were not born when the original gift took effect.] (*e*)

"Survivor" construed strictly, not as importing *other*.

Again in Crowder *v.* Stone, (*f*) where a testator bequeathed certain stock in the funds to his executors, in trust for his wife and brother for their respective lives, and after the decease of the survivor to be divided equally between his nephew and four nieces; and in case of the death of his said nephew or of any or either of his said nieces without lawful issue

(*d*) 14 Ves. 576. [R. D. survived the testator.

(*e*) See also Mann *v.* Thompson, Kay 644, 645. Whether a gift, not to several persons or the survivors of them, but simply to "children who *survive* A," includes any not born before A's death, was decided in the affirmative in In re Clark's Estate, 3 D., J. & S. 111; but in the negative in Gee *v.* Liddell, L. R., 2 Eq. 341; also Trickey *v.* Trickey, *post* p. *720.]

(*f*) 3 Russ. 217.

before their respective parts or shares should become due and payable to them, then the part or share of him, her or them so dying without issue as aforesaid should go and be equally divided between them and amongst the *survivor and survivors* of them, share and share alike. Lord Lyndhurst said, "It was contended that the words 'survivor and survivors of them' were to be construed 'other and others.' That is a construction which the court has, in some cases, put upon those or similar words; but it is what Lord Eldon in Davidson *v.* Dallas (*g*) calls a 'forced construction of the term survivor,' and he contrasts it with what he calls its 'natural meaning.' It is a construction which the court may sometimes be compelled to adopt, in order to accomplish the intention which appears on the whole of the will; and in Wilmot *v.* Wilmot (*h*) it was scarcely possible to put any other meaning on the words. But, in looking at the language and the provisions of this will, I do not find any such necessity; and it seems to me that the words 'survivor and survivors' are here to be taken in their natural meaning. The shares which became subject to the operation of the bequest to the survivor and survivors, will be *divisible among such only of the five legatees as were living at the time when the events happened on which the shares were to go over respectively." 2

Lord Lyndhurst's judgment in Crowder *v.* Stone.

Again, in Ranelagh *v.* Ranelagh, (*i*) where a testator, after bequeathing certain pecuniary legacies to his children for life, added, "in case of the demise of any of the above parties without legitimate issue, their, his or her proportions to be divided among the *survivors;*" Lord Brougham, C., treated it as clear (though it was not necessary to decide the point) that the word "survivors" was used in its plain and obvious sense, as meaning such of the individuals named as should be living when any of them happened to die.

Recent authorities for construing "survivors" strictly.

(*g*) 14 Ves. 578.

(*h*) 8 Ves. 10, *post* p. *698.

2. The word "survivor" has been construed strictly, as not equivalent to "other," in the case of Duryea *v.* Duryea, 85 Ill. 41, where the devise was to A and B, and if either die without issue, to the survivor. A died before the testator, and B took an absolute estate. So in a devise to A for life, then to her children B and C, and if they be deceased, "to the surviving children of A," Tucker *v.* Stites, 10 Geo. (Miss.) 196. So to daughters, and if they die without issue to testator's "surviving sons and daughters," Seddel *v.* Wills, Spencer 223; Jackson *v.* Blanshan, 3 Johns. 298; Guernsey *v.* Guernsey, 36 N. Y. 267; Deboe *v.* Lowen, 8 B. Mon. 616; Dooling *v.* Hobbs, 5 Harring. 405.

(*i*) 2 My. & K. 441.

And lastly, the same construction prevailed in Cromek *v.* Lumb (*k*) as to a clause providing that, in case any of the testator's grandchildren (who were the objects of a prior gift) should die, being a son under the age of twenty-three and without lawful issue, or being a daughter under that age and unmarried, then the share or shares of him, her or them so dying should go to the *survivor and survivors*, and the lawful issue of such as might be dead.

Effect of "other" being elsewhere associated with "survivor."

And the mere circumstance, that there occurs in the same will, in reference to another subject or other subjects, an instance of the words "survivor" and "other" being used conjunctively and as if synonymous, (*l*) is not considered to imply an intention that "survivor," standing alone, shall have the same force or signification as the term with which, in other instances, the testator has associated it.

Words "survivors or survivor" construed strictly.

Thus, in Winterton *v.* Crawfurd, (*m*) where a testator devised the residue of his real estate to trustees, upon trust as to one-third to pay the rents to the separate use of his daughter Harriet during her life, and after her decease, in trust for all her children, in equal shares, and the respective heirs of their bodies; and in case one or more of such children should die without issue, then as to his, her or their share or shares, in trust for the survivors or survivor *and others or other of them;* and after giving the other two-thirds by similar limitations to his daughters Louisa and Fanny, with remainder to their children, the testator proceeded to declare, that, in case one or more of his said daughters should *die without issue of her or their body or bodies, then the share or shares of her or them so dying should be in trust for the *survivors or survivor* of them for the lives or life of such *survivors or survivor*, to be held and enjoyed by the trustees for the joint natural lives of such *survivors* of the testator's said daughters, in trust for them as tenants in common, and the rents and profits of the accruing share or shares to be for their separate use, and after the decease of the *survivor* of his said daughters, in trust for the child and children *of the survivors or survivor* of his said daughters *per stirpes*, and the heirs of the bodies of such child and children; and in case any one or more of such chil-

(*k*) 3 Y. & C. 565.

[(*l*) So, the words "survivors and survivor *and* others and *other*" were held to be governed by "others," in Slade *v.* Parr, 7 Jur. 102. But "other surviving" is synonymous with "surviving," Beckwith *v.* Beckwith, 46 L. J., Ch. 97, *post* p. *701.]

(*m*) 1 R. & My. 407.

dren should die without issue, then as to the shares of him, her or them so dying, in trust for the *survivors or survivor, others or other* of them, and the heirs of the body of such survivors or survivor, others or other of them; and if all such children but one should die without issue, in trust for such surviving or only child and the heirs of his or her body; and in default of such issue, in trust for testator's nephews. Fanny died, leaving children. Louisa afterwards died without children, and the share of Louisa was claimed by and was now held to belong to Harriet, the only surviving daughter, to the exclusion of the children of Fanny. Sir J. Leach, M. R., said—"In order to effectuate the intention of the testator, the court sometimes gives to the word 'survivors' the sense of 'others.' Here the expressions of the testator are too precise to impute to him such an intention; and the survivors are to take as tenants in common for life for their separate use, which is wholly inconsistent with the notion that the testator meant that the children of a deceased daughter should, as to this third share, stand in the place of their parent. It is true that, in the gift over after the death of the surviving daughter to the children of the survivors or survivor, the words 'survivors or survivor' may receive a more enlarged meaning. The intention of the testator appears to have been, that no part of his real estate should go over to his nephews, except in the event of the failure of issue of all his three daughters: and this intention would be defeated, if, upon the death of Lady Winterton (*n*) without issue, which is stated to be a probable event, the children of the deceased sister were excluded. This question cannot, however, be decided during Lady Winterton's life; and all that can now be done is to declare, that Lady Winterton is *entitled for life, to her separate use, to the one-third share of the real estate, which by the will was given to her sister Louisa."

Remarks upon Winterton v. Crawfurd.

Sir J. Leach's observation in regard to the inconsistency of the devise *for life* to the survivors with the supposition that the children of the deceased devisees were to stand in their place is inconclusive, because though the estate for life could not take effect as to any deceased child, the devise in remainder to the issue of such child might. Indeed, if he was right in the opinion expressed by him, that after the death of the last surviving daughter the property would go over to the children of the deceased daughter, and not to the ulterior devisees, there seems to be great diffi-

(*n*) This lady was the survivor of the three daughters.

culty in maintaining the soundness of his decision, as it has the effect of reading words occurring in different parts of the same will in various senses. The case too would then be in direct opposition to Doe *v.* Wainewright, (*o*) where, *even in a deed*, the limitation of cross-remainders in tail to *surviving* children was held to take effect in favor of the issue of a deceased child, on the sole ground of its appearing, by the terms of the ultimate limitation, that the estate was not to go over, unless the issue of *all* the children failed.

Effect where gift over is combined with a collateral event.

In Aiton *v.* Brooks, (*p*) however, it was considered that, where the gift to the survivors was to take effect in the event of the decease of any of the prior objects of gift *combined with some collateral event*, the rule of construction adopted in the preceding cases did not apply, but that the word "survivor" might be construed *other*, on the ground, it should seem, that, as in such cases the ulterior or substituted gift is not to take effect absolutely and simply on the decease of the prior objects, it is the less likely that the testator should intend survivorship to be an essential ingredient in the qualification of the ulterior or substituted legatees.

Word "survivor" construed *other*.

In that case, a testator bequeathed £1500 stock to A and B during their lives, in equal shares, and immediately on the death of either he directed his trustees to pay the share of such deceasing legatee to her children who should be living at their mother's decease, and who should attain the age of twenty-one years, the interest in the meantime to be applied for maintenance; *but in case any of such children should die before they should attain the age of twenty-one years*, the testator gave the share of such deceasing child to the *survivor*; provided *always, that *in case either of them the said A or B should leave any child living at their respective deceases, but which should all die before they attained the age of twenty-one years*, then the trustees were to assign the share of such legatee so dying unto the *survivor* of them the said A and B, her executors or administrators. A died in the lifetime of B, leaving a child who attained twenty-one; B afterwards died without issue. Sir L. Shadwell, V. C., held A to be entitled to B's moiety, observing, "the word 'survivor' must of necessity be taken to mean 'other,' for the testator contemplated the event, not of one of the legatees dying in the lifetime of the other, *but of one of them dying childless*."

There appears to be much good sense in the distinction here sug-

(*o*) 5 T. R. 427, stated *post* p. *697. (*p*) 7 Sim. 204.

gested by his Honor, and had it originally obtained, a large amount of litigation would probably have been prevented; but the authorities seem now to present an insuperable obstacle to its adoption, for, in almost every instance in which the strict construction of the word "survivor" has prevailed, the gift to the survivors was to take effect in the event of the death of the predeceasing objects without issue, or combined with some other contingency. In Ferguson *v.* Dunbar, Milsom *v.* Awdry, Davidson *v.* Dallas, and lastly in Crowder *v.* Stone (which is a recent and leading case,) the gift over was to take effect on any of the objects dying, either without issue or under age, and yet it was held to apply only to the persons actually living at the period in question. Seeing, therefore, that Aiton *v.* Brooks was professedly grounded on a circumstance which is common to nearly all the authorities, and that some of those authorities were not cited to or present to the mind of the learned and able judge who decided it, the case can hardly be relied on as a general authority. In fact a different rule prevailed in the subsequent case of Leeming *v.* Sherratt, (*q*) which may be added to the authorities for giving to the word "survivor" a strict construction. A testator bequeathed £1000 to each of his six children, to be paid at twenty-one, except as to girls, one-half of whose shares was to be invested and the interest to be paid to them for life, and the principal to be disposed of in such manner as they should direct among their issue; and in case they should die without issue, he gave the principal among the survivors of his children in equal proportions. The testator then *gave his freehold property and the residue of his personalty to trustees, the proceeds to be divided among his children when the youngest should attain twenty-one, one-half of the daughters' shares to be invested, the interest to be paid to such daughters, and the principal to be disposed of in such manner as they should direct among their children: but if there were no children, then such share to be divided equally among the *survivors* of the testator's children: and in case of the death of any of his children, leaving lawful issue, the testator gave to such issue the share the parent so dying would have been entitled to have. One question was, whether the words "survivors of my children" were to be construed *others*. Sir J. Wigram held that the strict construction must prevail. He said, "In

Remark on doctrine advanced in Aiton *v.* Brooks.

Word "survivor" construed strictly.

Sir J. Wigram's judgment in Leeming *v.* Sherratt.

(*q*) 2 Hare 14. [See also Willetts *v.* Jur. 1010.]
Willetts, 7 Hare 38; Moate *v.* Moate, 16

Davidson *v.* Dallas, (*r*) Lord Eldon's language obviously imports that the word 'survivors' is to be construed in its natural sense, unless the will itself shows that it was used by the testator in a different sense; and Crowder *v.* Stone (*s*) is to the same effect. In Barlow *v.* Salter (*t*) the *dictum* of the court tends rather to treat the word as having a technical meaning (that of 'others') impressed upon it in practice. According to Davidson *v.* Dallas, one reason for construing 'survivors' to mean 'others' has been to take in all persons who should be born before the period of distribution. In other cases the object suggested has been to prevent a family losing the provision intended for it by the death of a parent, leaving children. The reason of the former of these cases could not occur here, in the case of the residue, because the testator's own children are the legatees of that residue. And, according to the construction that I feel myself at liberty to put upon that clause in the will which, in certain cases, substitutes the issue for the parents, I think the testator has guarded against the second inconvenience; and, so far at least as the residue is concerned, I think that, in the residuary clause, the word 'survivor' must be construed in its natural sense, and that this construction of the word in one part of the will must, in this will, determine its construction in the other part also."

[And, in Lee *v.* Stone, (*u*) where a testator devised a distinct *estate to each of his three daughters for life, with remainder to her children as tenants in common in fee; and provided, that if either of his daughters should happen to die without having issue, the estate devised to her should go to the survivors or survivor of the daughters, and their or her heirs as tenants in common; and if all the daughters but one should die without issue, their shares should go to the survivor in fee; it was held, that the word "survivor" must be construed according to its natural import.

In De Garagnol *v.* Liardet (*x*) a testator gave the residue of his

(*r*) 14 Ves. 576.

(*s*) 3 Russ. 217.

(*t*) 17 Ves. 479.

[(*u*) 1 Ex. 674. See also Stead *v.* Platt, 18 Beav. 50; Parsons *v.* Coke, 4 Drew. 296; Greenwood *v.* Percy, 26 Beav. 572; In re Corbett's Trusts, Joh. 591; Blundell *v.* Chapman, 33 Beav. 648; but as to the last case *qu.*, for the strict interpretation made the substitutionary words ("or their children") inoperative. However, it was *dictum* only.

(*x*) 32 Beav. 608. See also In re Usticke, 35 Beav. 338; Taylor *v.* Beverley, 1 Coll. 108 (gift to one child for life, and if she die without issue, to testator's surviving children.)

personal estate in unequal shares among his two sons and three daughters, the shares of the daughters to be held in trust for them for life, and afterwards for their respective children; but if one or more of the daughters should die without children the shares of the daughters were to be divided "amongst the survivors of them his said sons and daughters." It was held by Sir J. Romilly, M. R., that "survivors" must be construed strictly: it could not here be read "others," because the gift over was to a different class, and "others," he said, was confined to the others of the same class, *i. e.*, of those whose shares were to go over.

Gift over to survivors of a different class.

But where a gift to the "survivors" of several legatees, limited to take place on a certain event (as the death of any of them under age or without issue,) is followed by a gift over, not if there should be no survivor at the time the event happens, but if that event should happen to every one of the legatees; (as if all die under age, or without issue,) "survivors" is read "others." From the contingent gift over of the whole in a mass it is inferred that the testator meant the legatees to take it amongst them in every other contingency, which can only be secured by means of cross-limitations between them.

Effect of gift over on death of *all* in a given manner.

Thus, in Doe d. Watts *v.* Wainewright, (*y*) where by deed lands were limited, after previous life estates, to the use of the child or children of A as tenants in common, and the heirs of their several bodies; and in case any such child or children should die without issue, then the shares of such as so died should remain to the use of the *surviving* child or children of A, *and the heirs of their respective bodies; *and in case all the said children should die without issue*, or if A should have no issue, then over; it was held that the fair construction of the word "surviving" standing in this context was that on the death of one child without issue that portion should go to the surviving line of heirs, and not merely to one child surviving—to the surviving children in their own persons if living, or if dead to their issues; and that this was not proceeding on conjecture, for effect could not be given to the word "all" in the last sentence without determin-

"Survivors" construed "others" by force of gift over.

Doe v. Wainewright.

(*y*) 5 T. R. 427. Note that cross-remainders were not *implied;* that cannot be done in a deed (*ante* p. *536); the gift to *surviving* children was held to create them expressly though inaccurately.

ing that there must be cross-remainders not only as long as the individual children, but as long as the several lines of those children existed.

Cole v. Sewell.

So in Cole v. Sewell (z) where by deed lands were limited to the settlor's three daughters A, B and C as tenants in common for their lives, with several remainders to their first and other sons in tail male; provided that "if any one or two" of the daughters should die without issue male the same should stand limited to "the survivors or survivor," as tenants in common in case of two survivors, for the lives or life of such survivors or survivor, remainder to the first and other sons of such survivors or survivor in tail male. And in case the said A, B and C should die without issue male then as to the share of each to her daughters as tenants in common in tail. And in case "one or two" of the said A, B and C should die without issue, then, as to the share or shares of her or them so dying, to the daughters of such survivors or survivor in tail, as tenants in common in case of two survivors, and in case A, B and C should die without issue, then over; it was held by Sir E. Sugden, C. Ir., following Doe v. Wainewright, that survivors meant others. "Taking the whole together," he said, "the settlor was looking to *the event upon which the estate was to go over*, but he certainly did not mean that the circumstance of one of his daughters being actually alive at the time of the death of another without issue should be the event upon which was to depend the taking effect of the limitation in words to the survivor and her issue."

Wilmot v. Wilmot.

The same rule was applied to a gift of personalty in Wilmot v. Wilmot, (a) where a testator bequeathed one third part of his property to each of his three children, payable at a certain age, *and if either of them died before that age his share to be divided between the two surviving children; and in case of two dying before attaining the said age respectively, then the whole to go to the *surviving* child; but if all his children should die before they should attain their said respective ages, then over. One child attained the age and died; then another died under age; and the personal representative of the first was held by Lord Eldon to be entitled to share with the

(z) 4 D. & War. 1, 2 H. L. Cas. 186. See also Smith v. Osborne, 6 H. L. Cas. 375; In re Tharp, 1 D., J. & S. 453; Cooper v. Macdonald, L. R., 20 Eq. 258.

(a) 8 Ves. 10. See also Lucena v. Lucena, 7 Ch. D. 255, 269, stated *post* p. *704.

survivor the portion which went over on the death of the second. The L. C. said: "It must be argued that the word 'survivors' means the same as 'others,' or 'living at the age aforesaid.' In the clause in which the gift over is made it was never meant that any portion should be taken; it was to be either the whole or none."

The words of gift, in case of the death of either to the *two* surviving children, and, in case of the death of *two* to the surviving *child*, were undoubtedly favorable to this construction; and have since been held sufficient of themselves to show that by "surviving" the testator meant "other," his assumption obviously being that the others would survive. (*a*) But Lord Eldon rested Wilmot *v.* Wilmot on the ground indicated above, viz., the manifest intention to keep the whole together. Cole *v.* Sewell admits of a similar observation.

"Survivors" construed "others" by force of gift over.

More nearly resembling Doe *v.* Wainewright, in the circumstance that a "line of heirs" or issue is designated by the will, is the common case of a gift of real or personal estate to several persons for life, with several remainders to their children, and if any of them die without children, then to the survivors for life, and afterwards to their children. Here it is very improbable that a testator should intend to make the interest of the children depend on the accident of whether their parent (whose interest ceases on his death) dies first or second; and if to this is added a gift over in the event of all dying without children, the conclusion is irresistible that what the testator meant was that as long as there were descendants of any to take they should take the whole: and the only mode by which effect can be given to this intention is by holding that cross-remainders are created between the stocks, irrespective of the periods at which the parents die, by reading "survivors" as "others."(*b*) The authorities from Lord Thurlow's time downwards are almost *uniformly in favor of reading "survivors" as "others" in such a case. (*c*)

(*a*) In re Beck's Trusts, 37 L. J., Ch. 233. See an opposite inference drawn from a gift over, on the death of any one or more of *three* persons, to the survivors or *survivor*, Northen *v.* Carnegie, 28 L. J., Ch. 930.

(*b*) See per James, V. C., Badger *v.* Gregory, L. R., 8 Eq. 84, 85.

(*c*) Harman *v.* Dickinson, 1 B. C. C. 91, (5th ed.,) (where the original report is corrected from R. L.); Lowe *v.* Land, 1 Jur. 377; In re Keep's Will, 32 Beav. 122; Badger *v.* Gregory, L. R., 8 Eq. 78; Waite *v.* Littlewood, L. R., 8 Ch. 70; In re Palmer's Settlement, L. R., 19 Eq. 320; Wake *v.* Varah, 2 Ch. D. 348; Holland *v.* Allsop, 29 Beav. 498. In the last case a gift over was by construction im-

What is a sufficient gift over.

And the fact that the ultimate gift over is to the "survivor" of the class (in the literal sense of longest liver) makes no difference. To whomsoever it is given an intention is equally manifested to make a complete disposition of the property, and that all should go over in one mass. (*d*) And the gift over is equally efficacious though limited to take effect only in a particular event: for in the given event the testator had a clear intention of how the whole should go over, and if the parents die, the first leaving children, and the next one or two without leaving children, there would be an intestacy. (*e*)

Gift over inoperative on the context.

But if property is given to several as tenants in common for life, with several remainders to their children, and if any of the tenants for life die without children, to the "survivors" absolutely, or in tail, "survivors" will not be construed "others," even though there is also an ultimate gift over in case of all so dying. (*f*) Here, at least, the argument from caprice has no weight, for the children even of those who literally survive take nothing (as purchasers) by accruer; and the intention to keep the property together, which would otherwise be implied from the gift over, is disproved by the testator having by express intermediate limitations broken it up. Intestacy in a possible event is insufficient ground for reading the word otherwise than literally.

Residuary gift not equivalent to gift over.

And a mere residuary gift, which only prevents intestacy but shows no intention to dispose completely and in a mass of the particular property, will not supply the place of an ultimate gift over. (*g*)

ported from another bequest. Note, that in Ferguson *v.* Dunbar, 3 B. C. C. 468, n., *ante* p. *689, where survivors was construed strictly, the events upon which the gift to issue, the gift to survivors, and the gift over, depended, were all three different; moreover, the gift to survivors was absolute and not defeasible, like the original shares, in favor of issue.

(*d*) Wake *v.* Varah, 2 Ch. D. 357.

(*e*) Hurry *v.* Morgan, L. R., 3 Eq. 152. The trust was executory, with a direction to "insert clauses necessary to protect the entail:" but, although this was noticed as strengthening the case, the sufficiency of the gift over appears not to have been doubted by Wood, V. C. In re Hayes' Trusts, 9 Jur. (N. S.) 1068, (V. C. S.,) appears to be *contra*. See an analogous point in implying cross-remainders, Maden *v.* Taylor, 45 L. J., Ch. 573, *ante* p. *551.

(*f*) Maden *v.* Taylor, *supra;* and distinguish Cooper *v.* Macdonald, L. R., 16 Eq. 269, where real estate was devised in *tail*, and the personalty upon which the question arose was directed to go along with it.

(*g*) *Semb.*, see Maden *v.* Taylor, 45 L. J., Ch. 569, 575.

*But in In re Arnold's Trusts, (*h*) it was held by Sir R. Malins, V. C., that the ultimate gift over was not indispensable in these cases to the construing of "survivors" as others; and in his opinion Milsom *v.* Awdry (*i*) deciding the contrary was erroneous. This, however, is at variance with the judgment of the Court of Appeal in Wake *v.* Varah. (*k*) Baggallay, L. J., laid it down that although the literal interpretation of "survivor" might involve the imputation of a capricious intention and might lead to intestacy, this alone would not justify the court in interpreting the word otherwise: it was the ultimate gift over which supplied the necessary evidence of such an intention as could only be effectuated by construing the word as "other." And Sir W. James, L. J., was careful to show that the particular gift over in that case (viz., to the longest liver) was sufficient. "A whole category of cases (he said) has now settled that 'survivor' may be read 'other,' or 'surviving *stirps*,' (*l*) and has settled with reasonable clearness under what circumstances it may be so read."

As to construing "survivor" as "other" without aid of gift over.

That a gift to "survivors" for life and afterwards to their children, or to the "survivors in the same manner" as the original shares, without more, will not be construed a gift to "others" appears to have been expressly decided in Beckwith *v.* Beckwith, (*m*) where there was a bequest of residue to such of the testator's five daughters (named) as should be living at his death, the share of each such daughter to be held in trust for her during her life, and after her death for her children at twenty-one; and if there should be no child of such his daughter who should attain that age, then the testator declared that after the death of such daughter and such default of children, the original share and any accruing share of such daughter (subject to a general power for her to appoint a portion) should accrue *to his other daughters or other daughter surviving*, in equal shares if more than one, and that the accruing share or shares should be held upon the trusts, &c., therein contained concerning her original share. All the daughters survived the testator. Then A, one of them, died leaving a child; and afterwards another, C, died without having been

Beckwith *v.* Beckwith.

(*h*) L. R., 10 Eq. 252. The expression was "*other* surviving children." But no notice was taken of this peculiarity, as to which see *ante* p. *692, n. See also Crosse *v.* Maltby, L. R., 20 Eq. 378; Hodge *v.* Foot, 34 Beav. 349.

(*i*) 5 Ves. 465, *ante* p. *690. See also In re Corbett's Trusts, Joh. 591; In re Usticke, 35 Beav. 338.

(*k*) 2 Ch. D. 348, 355, 357, 358.

(*l*) As to this phrase, see *post* p. *703.

(*m*) 46 L. J., Ch. 97.

married. It was held by Sir C. Hall, V. C., that "sur*viving" meant "surviving the testator," and that the child of A was entitled to participate with the three other daughters in the share of C. But on appeal this was reversed by the L. JJ., who held that "surviving" meant surviving at the period of accruer. (o) The question then arose whether, assuming that to be so, "surviving" might not be construed "other;" and the court rejected that construction on the ground that there was no ultimate gift over. Sir W. James referred to the misapprehension which once prevailed, that "whenever there was a gift to daughters and their families, and a gift over to the survivors, the word 'survivors' *ex vi termini* must mean 'others.' We had occasion (he said) to consider this very fully in Wake *v.* Varah, which followed Waite *v.* Littlewood, (p) and Badger *v.* Gregory, (q) and there Lord Justice Baggallay in going through the cases found the clue which was to be considered as the *ratio decidendi* which was supplied by Waite *v.* Littlewood and Badger *v.* Gregory," viz., the ultimate gift over. He had himself (he added) endeavored to explain it in Badger *v.* Gregory, (q) in which case he had held that the ultimate gift over showed an intention to create cross-limitations among the children. "But in the absence of any such ground for raising the implication, I am of opinion that we must leave the words to bear their ordinary natural and grammatical interpretation." Baggallay, L. J., expressed a similar opinion. "The cases (he said) which have been mainly relied upon on the part of the respondents differ very materially from what we have before us. There is not in the present case a gift over in default of issue of all the daughters or children as there was in Waite *v.* Littlewood, Badger *v.* Gregory and Wake *v.* Varah."

Nevertheless, in In re Walker's Estate, (r) where residue was given in trust for the testator's son and five daughters during their respective lives as tenants in common, and after the death of each his or her share or shares to be in trust for his or her children at twenty-one; provided that if any of testator's said children should die without leaving a child who should attain twenty-one, his or her share or shares should be held "in trust for my *then surviving* (s) child or

(o) See a similar point in Nevill *v.* Boddam, 28 Beav. 554; and generally as to the period to which survivorship is to be referred, *post* § 3.

(p) L. R., 8 Ch. 70.

(q) L. R., 8 Eq. 78.

(r) 12 Ch. D. 205.

(s) This expression was held to be not more difficult to deal with than "surviving" simply. So, "then living," Cooper *v.* Macdonald, L. R., 16 Eq. 258, 272.

children in such manner *in all respects as is hereinbefore declared regarding" his or her original share or shares. The son and five daughters survived the testator. The son then died leaving children; and afterwards two of the daughters died without issue. It was held by Sir C. Hall that the son's children were entitled to portions of the deceased daughter's shares. He relied on In re Arnold's Trusts and Hodge *v.* Foot, (*t*) and on the fact that although there was a gift over in Waite *v.* Littlewood (*u*) it did not appear in the head-note. He considered that the reasoning of Lord Selborne in that case, and of the M. R. in Lucena *v.* Lucena, (*x*) was favorable to a broad reading of the words in the present will, and that the same might be said of the judgment delivered by Cotton, L. J., in the latter case; "For (said the V. C.) he stated two grounds that might be relied on (*i. e.*, a gift to survivors, and an ultimate gift over,) and I do not find him saying that either might not suffice. In fact I should rather read his judgment the other way. As regards Beckwith *v.* Beckwith I cannot look upon it as a decision that in the circumstance of the absence of a gift over a broad reading of the words would not be adopted. All the authorities are in favor of that reading, and therefore I put that construction on this will."

But for these remarks, Beckwith *v.* Beckwith might have seemed to be a decision upon the very point in question, and, as such, to outweigh previous decisions of inferior courts, defective head-notes, and doubtful hints of opposite opinions detected in cases which did not raise the question. With regard to Lucena *v.* Lucena, it will be seen that the question there was not whether "surviving" was to be construed strictly or "broadly," but which of two non-literal constructions was to be preferred; that there was in fact a gift over in that case; and that the judgment delivered by Cotton, L. J., was that of the whole court, including James and Baggallay, L. JJ., who decided Beckwith *v.* Beckwith, and could scarcely have been intended thus without comment to contradict the opinions expressed in that case and in Wake *v.* Varah.

In Waite *v.* Littlewood (*y*) Lord Selborne said he thought there was

(*t*) *Ante* p. *701.

(*u*) L. R., 8 Ch. 70. Lord Selborne certainly did not, so clearly as the L. JJ., treat a gift over as essential. Note, however, that the report does not profess to give his judgment *verbatim*.

(*x*) 7 Ch. D. 255, stated *post* p. *704.

(*y*) L. R., 8 Ch. 73.

The so-called "stirpital" construction.

a strong probability that any one using the word "survivor" did not precisely mean "other" by it, but had in his mind some *idea of survivorship, though it was imperfectly expressed; and that simply to read the word as "other" was an unwarrantable alteration of a testator's language and meaning. He therefore preferred to read "survivors" or "surviving children," as meaning those who survive actually in person, or figuratively in their descendants taking an interest under the primary gift, which he appeared to consider a less violent change.

This construction (which was probably suggested by a figure of speech used by the court in Doe *v.* Wainewright, (*z*) when describing the operation in that case of cross-remainders in tail,) was tested in Lucena *v.* Lucena, (*a*) where a testator gave the residue of his estate in trust for his three sons and three daughters equally, the shares of sons to be paid at the age of twenty-five if they should conduct themselves with propriety (as they did,) if not, to be settled like the shares of daughters, which were to be held in trust for them during their lives, and after their death, as to the shares of such as should die leaving issue, in trust for such issue equally, to be paid at the age of twenty-five. Then, (1) as to any daughter who should die without leaving a child who should attain twenty-five; and (2) as regards any son absolutely entitled on attaining twenty-five, if he should die before that age; or (3) if the direction to settle any son's share came into operation, if such son should die without issue, (*b*) then the testator directed his or her share "to be divided equally among his (testator's) surviving children, in the same manner as his or their original shares;" and in the event of a failure of all the testator's children and their issue who were objects of the prior gifts, then over. All the sons attained twenty-five; then two of them died, one of them leaving issue; after which two of the daughters died, each leaving issue; and then the third daughter died without issue. Sir G. Jessel, M. R., held that, if all the shares had been settled, the words "surviving children" must, according to Lord Selborne's doctrine, have been construed "surviving stock," and that the fact of some only of the shares being settled did not make that construction less applicable. The effect of

(*z*) 5 T. R., 427, *ante* p. *697.

(*a*) 7 Ch. D. 255.

(*b*) The events on which the gift to surviving children was to take effect, and the ultimate gift over, were obscurely expressed; they are here stated as they were construed by the Court of Appeal.

this was to give the third daughter's share wholly to the surviving son and the issue of the predeceased daughters, to the exclusion of both the predeceased sons. But, on appeal, it was held by the *L. JJ. James, Baggallay and Cotton, that "surviving" must be construed "other," and that the representatives of the two predeceased sons were entitled to share. The judgment of the court was delivered by Cotton, L. J., who said: "The shares of sons, who conduct themselves with propriety, are indefeasibly vested at the age of twenty-five, and in our opinion it would be more reasonable to say that the idea in the testator's mind as regards sons, in using the word surviving, had reference to those who survived the period when their shares became indefeasibly vested, (c) than to attribute to the word a construction which would give to the children of a son, who did not conduct himself with propriety, an interest under the gift to surviving children, while it gives no interest to a deceased son who had conducted himself with propriety. The fact of shares being settled, and the fact of the ultimate gift over being to arise in the event of a failure of all children and issue who are objects of the testator's bounty, are circumstances each of which may properly be relied upon as showing that 'survivors' is not to receive its strict construction. Each of these circumstances exists in the present case. If, with the gift over standing as it does, there had been no settlement of the daughters' shares, we are of opinion that the word 'surviving' would not have received its strict construction, and must have been construed 'other;' and our opinion is that the circumstance of the shares of some of the children named in the will being settled is not sufficient to give to the word 'surviving,' as a matter of construction, the meaning of survivors in person or in issue taking an interest under the will, though that would have been the effect of the gift to survivors if the shares of all the children and not of some only had been settled. We are of opinion that the decision of the M. R. was correct so far as he held that 'surviving' could not receive its strict construction, but that he was wrong in attributing to this word the meaning which he has given to it."

Consequences of the "stirpital" construction.

And where all the shares are settled, this so-called stirpital construction will often fail to preserve the interests of children; since a member of a *stirps* which is extinguished before the period of accruer will not participate in the accruing share, although he may have fulfilled the conditions required for the vesting

(c) As in Wilmot *v.* Wilmot, 8 Ves. 10, *sup.*

of his original share (as, by attaining twenty-one), and although accruing shares may be directed to be held on the same *trusts as original shares. This indeed appears from the decision of the M. R. in Lucena *v.* Lucena, which excluded the deceased sons, treating them as non-surviving *stirpes* or stocks. Where the cross-limitations are *remainders* in tail, as in Doe *v.* Wainewright, "surviving *stirps*" is synonymous with "other," because the interest given cannot outlast the *stirps;* in that case the new doctrine is equally harmless and inoperative. In other cases it appears to be misleading.

As to construing "survivor" as "other" after an estate tail.

Again, it was said by Sir W. P. Wood, V. C., in In re Corbett's Trusts, (*d*) that where the primary devise confers an estate tail, and on the death of any without issue his share is given to the survivors or survivor, the words "survivors or survivor" are almost of necessity construed "others or other," on account of the great improbability of the testator contemplating the members of the original class as likely to be in existence at the time of an indefinite failure of issue of any of them. In Tufnell *v.* Borrell, (*e*) where the devise was to "grandchildren their heirs male and the heirs male of the survivors and survivor forever," it appears that in a previous stage of the case it had been decided that this gave the grandchildren joint estates for life with several estates of inheritance in tail male (*f*) *with cross-remainders* in tail male: and the case now proceeding on that footing, Sir G. Jessel said it was settled that in cases of this class the term "survivors" must be read "others." It is also to be observed that the case in which (as already noted) Sir W. Grant assumed this to be the proper general meaning of the word was of the same class. (*g*)

But it should be observed that no such rule was noticed in Smith *v.* Osborne, (*h*) where a testator devised land to his two daughters as tenants in common in tail, and if either should die without issue then to the surviving daughter in tail, and in default of such issue over. On the contrary Lord Cranworth relied on the particular language and circumstances, and on the ultimate gift over. He said, "This is not a

(*d*) Joh. 597.

(*e*) L. R., 20 Eq. 194.

(*f*) As to this see *ante* p. *252

(*g*) Barlow *v.* Salter, 17 Ves. 479, *ante* p. *689. See also Williams *v.* James, 20 W. R. 1010, presently stated, which turned on its special language.

(*h*) 6 H. L. Cas. 375, 393. See also Wollen *v.* Andrewes, 2 Bing. 26.

gift to a class, and on the death of one or more to the survivors or survivor, but a gift to two designated devisees as tenants in common in tail, and if *either* should die without issue then to the surviving daughter *and the heirs of her body. Unless the word 'surviving' is to be taken to mean 'other' the intention cannot be carried into effect, for he means his gift over to come into operation if either (*i*) of his daughters should die without issue, that is, on the death of the daughter who dies first, or of the daughter who dies last, and the latter object cannot be accomplished unless the word surviving shall be so read as to be rendered capable of being applied to the predeceasing daughter. Add to which the gift over to the testator's right heirs is only 'in default of such issue,' that is all such issue which includes the issue of both daughters."

But, of course, such ultimate gift over is not the only means of showing an intention in cases of this class to use the word "surviving" in the sense of "other." Thus in Williams *v.* James (*k*) where a testator devised a separate freehold property to each of five named children of his son O. in tail general: and proceeded thus, "in case if either of all the within-named children of O. shall happen to die leaving no lawful issue, or if they leave lawful issue if such issue die leaving no lawful issue, in any of such cases the property of him, her or them so dying shall be equally transferred to the use and uses of the surviving child or children of O. *that are herein named* in tail general; it was held by the Court of Exchequer that "surviving" meant "other" on two grounds. 1. On account of the phrase "that are herein named," by which the testator undertook to name the children who would be surviving at the future epoch; which was impossible. Some alteration was therefore necessary to make the phrase sensible. Either the words "of those" might be prefixed to it, or "other" might be substituted for "surviving." By the former alteration the testator's bounty to issue would still remain dependent on the accident of their parent surviving the child whose share was given over; by the latter this risk would be removed: and it was allowable to prefer a reasona-

(*i*) Lord Selborne thought the same argument applied, "though with rather less force," to a case where the primary gift is to a class for life, with remainder to children, and the corresponding word in the gift over is "any," Waite *v.* Littlewood, L. R, 8 Ch. 74. And in Cole *v.* Sewell, *sup.*, Sir E. Sugden adverted to "the event upon which the estate was to go over" as a ground for putting the more liberal construction on "survivors or survivor;" *i. e.*, he collected the intent without resorting to the description of the donee.

(*k*) 20 W. R. 1010.

ble and probable sense to an unreasonable and improbable one. 2. On account of the general improbability observed by Sir W. P. Wood of survivorship being in such a case literally intended.

"Survivors" read "others" to effect intention that children should stand in their parents' place.

*In Eyre *v.* Marsden, (*l*) "survivor" was construed "other" in order to give effect to the intention, manifested by the will, that issue of deceased legatees should take by substitution every interest, accruing (*m*) as well as original, which their parents would have been entitled to if living at the period of distribution. The testator gave his real and personal estate to trustees, upon trust out of the rents and annual produce to pay certain life annuities to his three children, and to accumulate the surplus for the benefit of his grandchildren; and after the death of his said children and the longest liver of them, to sell and distribute the whole among his grandchildren living at his decease, in equal shares, except the share of F., the son of a deceased daughter, half of whose share in the testator's estate and effects, in consideration of the benefit taken by F. under his uncle's will, the testator gave to his brother G.; and if any of his grandchildren should die before his, her or their share or shares became payable leaving issue, such issue to be entitled to the share or shares which his, her or their deceased parent *would have been entitled to if then living;* but in case of the death of any of the grandchildren without leaving issue, before he or she or they should become entitled to receive his, her or their share or respective shares in manner aforesaid, then his or her share or shares were given among the testator's *surviving* grandchildren, *to be paid at the same time and in the same manner as before mentioned touching the original share or shares of his said grandchildren.* It was held by Lord Cottenham that the issue were to stand in the place of the parent as to both the original and accruing shares. He thought the description of what was given to the issue amply sufficient to carry accruing shares; but those shares were given to *surviving* grandchildren, and there would be much difficulty in the construction if it were necessary to consider the word "surviving" as meaning "living at the time of the accruer taking place." "But (he said) it is not necessary to give it that meaning. The word 'surviving' has been construed 'other' to give effect to the apparent intention. Lord Eldon so lays down the rule in Wilmot *v.* Wilmot. If 'surviving' were to be construed

(*l*) 4 My. & C. 231, affirming 2 Kee. 564. (*m*) See § 2.

'living at the time when the accruer takes place,' the grandchildren then living would take absolute interests, unless the words 'in the same manner,' &c., introduce into this gift the provision for the children, and the gift over upon death without *children; and if it do so, why is it not also to introduce into this gift the provision for children, in the event of the parent's death before the happening of the accruer? If this construction be not adopted, upon the death of all the grandchildren but one during the life of the surviving annuitant, the share of that one, afterwards dying in the lifetime of the annuitant, would be undisposed of, although all the other grandchildren might have left children. I think the intention is sufficiently expressed, and there is ample authority for construing the words so as to give effect to such intention."

"Survivor" in gift of residue explained by another clause referring to it.

Again, in Hawkins *v.* Hamerton, (*m*) where a testator bequeathed a leasehold estate to his son; but in case he should die without issue, to be considered as part of the residue, and to be divided amongst the children of his (testator's) three daughters as thereinafter mentioned. And he bequeathed the residue to his said son and three daughters, or such of them as should be living at his wife's death, for life, remainder to the children of his said son and daughters in equal shares; and if any of his said son and daughters should die without leaving issue, his or her share to go amongst the survivor or survivors of his said children and their issue in the like equal shares; Sir L. Shadwell, V. C., thought that when the testator used the words "survivors or survivor," the order in which his children might die, successively, was not present to his mind; but, taking that clause in connection with the gift over of the leasehold, which showed that the testator intended the residue to be divided among the children of his three daughters, the V. C.'s opinion was that the testator meant others or other.

"Survivors" not read "others" if the gift thereby becomes too remote.

But a strong argument against reading the word as "other," is supplied by the fact that by so doing the will would become ineffectual; as in the case of Turner *v.* Frampton, (*n*) where a testator bequeathed his residuary estate between his children A and B, and if either die without issue, to the *survivor;* by allowing the word its proper sense, the failure of issue was confined to failure at the death of the prior legatee, whereas by reading it as "other," such failure would have been indefinite;

(*m*) 16 Sim. 410, 13 Jur. 2.

(*n*) 2 Coll. 331.]

Sir J. K. Bruce, V. C., therefore refused to adopt the latter construction.]

General conclusion from the cases, and practical suggestion.

The result then would seem to be that the word "survivor" when unexplained by the context must be interpreted according *to its literal import: but the conviction that this construction most commonly defeats the actual intention of testators, [and that the word is one peculiarly liable to misuse,] has induced a readiness in the courts to yield to the slightest indication in the context of an intention to use the word in the sense of "other."[3] [Some progress has been made in ascertaining when this may be done.] But the present state of the authorities seems hardly to justify the hope that litigation has reached its limits on this often-occurring slip, and should teach to framers of wills the necessity of increased attention to its avoidance.

Whether clauses of accruer extend to accruing shares.

II.—It has long been an established rule, that clauses disposing of the shares of devisees and legatees dying before a given period, do not, without a positive and distinct indication of intention, extend to shares accruing under the clauses in question. "As where a man gives a sum of money to be divided amongst four persons as tenants in common, and declares that if one (*qu.* any) of them die before twenty-one or marriage, it shall survive to the others. If one dies, and three are living, the share of that one so dying will survive to the other three, but if a second dies, nothing will survive to the remainder but the second's original share, for the accruing share is as a new legacy, and there is no further survivorship." (*o*)

3. In Skinner *v.* Lamb, 3 Ired. L. 155, the testator directed the balance of his estate to be equally divided between his wife and children. In another clause he said: "My wish and desire is, should either of my children die, without leaving an heir begotten by their body or bodies, that the survivor or survivors have the whole;" and again, in a different clause: "Should my children all die without leaving an heir, begotten by their bodies, my wish and desire is, that my brother T. should heir the whole of my estate as allotted to my children." The testator left three children, M., O. and E. M. died leaving a child. O. died, after the death of M., without issue, and E. survived. It was held that all of the estate of O. became vested in E., her only surviving sister, and that the child of M. took no share of it.

(*o*) Per Lord Hardwicke in Pain *v.* Benson, 3 Atk. 80. See also Perkins *v.* Micklethwaite, 2 Ch. Rep. 171, 1 P. W. 274; Rudge *v.* Barker, Cas. temp. Talb. 124; Barnes *v.* Ballard, before Lord King, cit. 2 Atk. 78.

Thus, in Ex parte West, (p) where a testator bequeathed to A, B and C, the three sons of S., £1000 each, the interest to be added to the principal yearly, until they should respectively attain the age of twenty-one years; *and in case any of them should die before that age, then to the survivors.* A and B died under twenty-one; and the question (which was raised upon petition) was, whether that part of the share of B, which accrued to him on the death of A, went over to C on the death of B. Lord Thurlow thought [that he was bound by the authorities (which he hesitated to overrule upon petition) to decide that] it did not survive again; but [gave the parties *leave to file a bill, which was done,] and the cause came to a hearing before Sir Ll. Kenyon, M. R., who decided against the survivorship of such accrued share.

This doctrine, though it has been much disapproved of, is now well established; but the question sometimes arises as to the effect of particular expressions to carry the accrued as well as the original share.

Word "share" does not carry accruing share.

The word *share* from an early period (q) has been held *not* to have this operation, though the contrary was decided by Lord Hardwicke in Pain v. Benson; (r) but the authority of this case has been repeatedly denied, (s) and the point has long ceased to be the subject of controversy. One example of the construction, therefore, will suffice. In Rickett v. Guillemard (t) a testator bequeathed £300 to four persons, to be divided into equal shares, to be paid at twenty-one; and in case of the death of either before twenty-one, *such share* to survive to the others. Two of the legatees died during minority in the testator's lifetime. Sir L. Shadwell, V. C., held that on the death of the first his fourth devolved to the other three; on the death of the second his original fourth devolved

(p) 1 B. C. C. 575. See also Crowder v. Stone, 3 Russ. 217. [It is remarkable that in Perkins v. Micklethwaite, Barnes v. Ballard, and Ex parte West, although the clause of survivorship was in terms which created a joint tenancy between the survivors in the share of the deceased legatee, (see Jones v. Hall, 16 Sim. 500, Leigh v. Mosley, 14 Beav. 605,) this fact was not mentioned in support of the argument for survivorship of accrued shares. The same consideration would have rendered much of the argument against the decision in Worlidge v. Churchill (stated *post*) unnecessary.]

(q) Woodward v. Glassbrook, 2 Vern. 388; [Crowder v. Stone, 3 Russ. 217; Jones v. Hall, 16 Sim. 500; Goodwin v. Finlayson, 25 Beav. 65; Evans v. Evans, Id. 81; Maddison v. Chapman, 4 K. & J. 716; Cambridge v. Rous, 25 Beav. 416.]

(r) 3 Atk. 78.

(s) See 1 B. C. C. 575; 2 Ves., Jr., 534.

[(t) 12 Sim. 88.]

to the two survivors; but the third of the first-mentioned fourth, which he would have been entitled to absolutely if he had survived the testator, lapsed.

Word "*portion*" does not carry accruing share;

And the word "portion," which is evidently synonymous with "share," has also been held not to comprise an accrued share.

Thus, in Bright *v.* Rowe, (*u*) where a testatrix, by virtue of a power, appointed the reversion of a sum of £2000 (in which herself and her husband had life interests) to trustees, upon trust for her daughter M., or any other children she might thereafter have by her husband J., to be equally divided between them; but it was her will, that in case the £2000 should become payable before M. should attain twenty-one or day of marriage, or before any other of her children being a son should attain twenty-one, or being a daughter the same age or marry, then the trustees were to invest the same and apply the interest of each child's share for maintenance, and when any such children being sons should attain twenty-one, or being daughters the *like age or day of marriage, upon trust to pay them their respective shares of the principal with the unapplied interest. And in case her said daughter M., or any other child she might have by her husband, should happen to die before his, her or their *portion* or *portions* of the said sum of £2000 should become payable, then the same should respectively go and belong to the survivors or survivor of them. The testatrix left three children, one of whom died in 1826, and another in 1829, before the period of payment. It was held by Sir J. Leach, M. R., that the share which accrued to the latter on the decease of the former did not pass with the original share to the surviving child.

—unless aided by the context.

But although the word "share" or "portion" will not *proprio vigore* carry the accruing share, yet if the testator manifest an intention that the entire property, which is the subject of disposition, shall pass over to the ultimate objects of distribution in one mass, and that all the shares, original and accruing, shall be distributed among one and the same class of objects, the accruing shares will be carried over together with the original shares to those objects. Thus, in Worlidge *v.* Churchill, (*x*) where a testator devised his real

(*u*) 3 My. & K. 316; [Perkins *v.* Micklethwaite, 1 P. W. 274.]

(*x*) 3 B. C. C. 465. See also Barker *v.* Lea, T. & R. 413, where Plumer, M. R., also reasoned upon the intention apparent in the will, that the fund should go over among the legatees in one mass, as excluding the doctrine in the text; but the

and personal estate to trustees, upon trust to sell, and gave the moneys arising therefrom in trust for his four children, R., E., W. and J., to be equally divided among them on their attaining twenty-one; *but if any of them died under that age, then such deceased child's* SHARE *to go to the survivors or survivor;* and he directed the trustees to apply the interest of such trust money during their minority for their maintenance and education; but if the interest should be more than sufficient for such purpose, he directed the trustees to lay out the same for the children's mutual benefit; but if *all* the four children should happen to die before twenty one, and leave M. living, then he directed the trustees to pay M. the interest of such *trust money* from time to time, as it should grow due; and after the decease of *all*, he bequeathed the said *trust money* to the children of his late uncle F. J. died in the testator's lifetime. R. and W. survived the testator, but afterwards died *under twenty-one. The question was, whether E., the last survivor, was entitled to the accrued shares of the two deceased survivors. Buller, J., sitting for Lord Thurlow, said, "If this were *res nova*, and there was a limitation to survivors and survivor, no one could collect the intent to be otherwise than that the survivor should take the whole: but if the case had rested there, I should have thought it difficult to get over the objections. But the strong part of the present case is the testator's intention to keep it as an aggregate fund: he has made use in two different parts of the will of the words 'trust money;' that expression does not apply to the share of each child, but to the whole fund in the trustees' hands, and takes in the whole fund that is to be distributed under the will. The second place where he uses the expression '*trust money*,' is in the gift over to the children of his uncle; and though the expressions, 'the whole,' or 'all,' are not used, the words 'trust money' are tantamount to them."

Accrued shares held to pass under the denomination of "share" by force of context.

So, in Eyre *v.* Marsden (*y*) one question was, whether that portion of the shares of grandchildren dying without issue, which had previously accrued to them by the predecease of other

Word "share" held to comprise accrued

point did not arise, as the deceased person (whose alleged share was the subject of dispute) had not attained the vesting age, and therefore had no share upon which the limitation over could operate. This, indeed, was admitted by his Honor in his judgment, but the terms of the decree are contrary. The case abounds in inaccuracies.

(*y*) 2 Kee. 564, [affirmed 4 My. & C. 231, stated *ante* p. *708.

as well as original share.

objects, passed over with the original shares to the survivors, or belonged to their representatives. Lord Langdale, M. R., while he admitted the general rule, considered that here the testator had manifested an intention that the accrued and original shares should, at the decease of his surviving child, be distributed together among one and the same class of objects. He observed that the testator meant that an aggregate and previously undivided fund should be then, for the first time, divided among a class in whom the fund vested from the time of the testator's death, subject to a provision for divestment, which was meant to be applied to every interest—to the interests which accrued in the grandchildren, and to the interests which accrued in the children (z) of grandchildren.

Accrued shares held to pass under gift of "the whole."

Again, in Sillick v. Booth, (a) where a testator devised and bequeathed all his real estate and his convertible personal estate to trustees, upon trust to convert the same into money, and thereout to pay his debts, funeral expenses, and a weekly sum to his wife, and to divide the residue of his said estate and effects *equally between and among his children J., M. and C., and his grandson R., share and share alike, the share of M. to be paid her as soon after his decease as conveniently might be; the share of C. to be paid him at the age of twenty-two, and the share of R. at the age of twenty-one; and in case any of his children or grandchildren should die before his or her said share should become so *vested* (which was construed to mean *payable*) as aforesaid, then the share or shares of him, her or them so dying should go and be equally divided among the survivors and survivor of them in equal shares and proportions if more than one, and if but one, then *the whole to and for the use and benefit of such survivor*. J. and C. died in the testator's lifetime, the latter being under twenty-two. R. survived the testator, but died under twenty-one. Sir J. K. Bruce, V. C., held that the word "whole" meant the entire residue, not the whole share merely, and consequently that the accrued as well as the original shares devolved to M. as the sole survivor of the four residuary legatees.

[The effect of this construction of "share" is to create cross-

(z) As to this see *ante* p. *187.]

(a) 1 Y. & C. C. C. 121, 739. See also Leeming v. Sherratt, 2 Hare 14, stated *ante* p. *695, where the words "the *part or share* the parent so dying would have been entitled to have" were held to comprise accruing shares.

remainders or cross-limitations which operate *toties quoties* upon the death of every devisee or legatee in the manner described, and carry over his whole interest, accrued as well as original. (*b*)

Effect of ultimate gift over extends to intermediate accruer.

There is a difference between a gift over of the shares of any prior legatees to the survivors, and a gift to several "with benefit of survivorship." The latter expression is very general, and may without impropriety be held to pervade the whole fund, so as to carry accrued as well as original shares. (*c*) It seems also that "share and interest" will carry accrued shares *proprio vigore*. (*d*) And where, after a gift to sons and daughters, there was a gift over, on the death of any one or more, of *his or her* share or *shares*, it was held by Sir W. P. Wood, V. C., that this implied a plurality of shares in one person, and therefore that it included accrued shares. If the words had been "his or their share or shares," they might have been read *reddendo singula singulis*. (*e*)

"Benefit of survivorship" held to carry accrued shares.

"Interest."

"His or her share or *shares*."

In Vandergucht *v.* Blake, (*f*) it was contended that an accrued *share went over, although under the circumstances the original share could not. There a testatrix bequeathed a long exchequer annuity to each of her three children, A, B and C for life, with remainders to their respective children; but if either should die without issue, then the annuity of him or her so dying to go to the survivors or survivor equally; and if all should die without issue, the three annuities were given over. A died without leaving children, and then B died *leaving children;* and it was contended that, although, as B left children, his original share could not go over, yet that his portion of the share which accrued to him on the death of A went over to C, the last survivor: but Sir R. P. Arden, M. R., decided that such portion belonged to B's administrator.]

It may be observed, that upon a principle very similar to that which

[(*b*) Doe d. Clift *v.* Birkhead, 4 Ex. 110, expressly overruling Edwards *v.* Alliston, 4 Russ. 78; Douglas *v.* Andrews, 14 Beav. 347. See also Dutton *v.* Crowdy, 33 Beav. 272; In re Henriques' Trusts, W. N. 1875, p. 187 (Settlement.)

(*c*) See In re Crawhall's Trusts, 8 D., M. & G. 480. See, however, Vorley *v.* Richardson, Id. 126.

(*d*) Per Romilly, M. R., Douglas *v.* Andrews, 14 Beav. 347; and see In re Henriques' Trusts, W. N. 1875, p. 187; also Goodman *v.* Goodman, 1 De G. & S. 695, 12 Jur. 258.

(*e*) Wilmot *v.* Flewitt, 11 Jur. (N. S.) 820.

(*f*) 2 Ves., Jr., 534.]

Accruing shares not necessarily subject as the original.

governs the preceding cases, if original shares are given expressly for life, and accruing shares indefinitely (which of course carries the absolute interest,) the latter are not considered as impliedly subject to the restriction in point of interest imposed on the original shares; (*g*) for although it is highly probable that the testator had the same intention in regard to the accruing and the original shares, yet this is not so clear as to amount to what the law deems a necessary implication. (*h*)

So, where a testator limits an estate to three or more objects, subject to many provisions, with a devise over of the whole in case of the death of any one to the survivors, expressly *subject to the provisions contained in the original gift*, and goes on to limit the property, in case of the death of any of such survivors, to the remaining survivors or survivor, *but does not repeat the qualifying words*, it has been held that a similarity of intention is not to be implied in regard to the last limitation.

Express provision in one limitation to survivors not extended by implication to an ulterior similar limitation of the same subject to part of the former objects.

Thus, in Georges *v.* Georges, (*i*) where the testator gave the residue of his estate, both real and personal, to trustees, in trust to keep the same together till January 1st, 1804, and till that period to dispose of the profits for the benefit of his daughter and granddaughters as therein directed; and then as to the final *disposition of the rest and residue of the estate, he declared that all such parts thereof as consisted of real estates, slaves, &c., should be upon further trust, that his said trustees should immediately after the arrival of the period aforementioned divide the same into three equal parts or shares, to and for the separate use and benefit of his daughter F., his granddaughter R., and his granddaughter S., whom he thereby willed and ordained to be his residuary devisees and legatees in manner and form following (that is to say,) &c. The testator then proceeded to declare the trusts of the respective thirds in favor of his daughter and grand-

(*g*) Vandergucht *v.* Blake, 2 Ves., Jr., 534; [Ranelagh *v.* Ranelagh, 4 Beav. 419; Ware *v.* Watson, 7 D., M. & G. 248. See also Milsom *v.* Awdry, 5 Ves. 465.] But in Doe d. Gigg *v.* Bradley, 16 East 399, Lord Ellenborough cut down the gift of a leasehold house to survivors indefinitely to an interest for life, on no other ground, it would seem, than that words of limitation were used in the original gift, not in the gift to survivors, which has not in general been considered as affording more than conjecture. The will certainly was very obscure.

(*h*) As to what is and is not such, see also *ante* vol. I., p. *525.

(*i*) Hayes' Inquiry 52.

daughters respectively, and their respective children, with a proviso that if one of his three residuary devisees should die before the period should arrive for making the division without issue, or leaving issue and such issue should die before that period, then the division should be made between the survivors of his said residuary devisees aforenamed, agreeable to the same directions, and *subject to the same terms, limitations and restrictions as were thereinbefore expressed and declared*, and that in the same manner as if all three of his said residuary legatees and devisees were then alive; and if two of them should depart this life before the arrival of such period without issue then living as aforesaid, then he declared it to be his further will and desire that the whole should be *in trust, and to and for the use of the survivor or her issue living at the period aforesaid.* F. and S. died before January 1st, 1804, without issue then living; but R. was living at that period. The question was, whether the will was to be read as if the qualifying words, "agreeable to the same directions, and subject to the same terms, limitations," &c., which occurred after the gift to the *two* surviving, had also been inserted after the gift to the *one* surviving. It was contended that necessary implication does not mean only what arises from force of language or plain logical conclusion, but that in a moral sense, and not in a grammatical sense, it is when there exists so strong a probability of intent that it would be irrational to draw a contrary inference. But Lord Eldon, after great consideration, held that the words of the will did not raise a necessary inference that the gift of the whole to the one surviving was intended to be subject to the same limitations as the share which that survivor would have taken on a division between the three, or the two, would, by the express words of the will, have been subject to, and that such a construction would be mainly founded on conjecture.

Qualifications expressly applied to original shares not extended by implication to accruing shares.

*The principle that restrictions or qualifications applied to original shares are not, by necessary inference, to be extended to accruing shares, is further illustrated by the case of Gibbons *v.* Langdon,(*k*) where a testator bequeathed £2800 stock, in trust for his wife for life, and at her decease to be equally divided between his three sons and daughter, the interest of his daughter's share to be paid to her for life, and at her decease the said share to be equally divided among her children living at the testator's decease at the ages therein mentioned.

(*k*) 6 Sim. 260.

If his daughter had no children living at her decease, her share to be equally divided among such of his sons who were then living, or their issue; *but if any of his said sons and daughter should die before his said wife and without leaving any issue, such share or shares to be equally divided among his other children;* but if all his children should die without issue before his said wife, then to his next of kin. One of the sons died in the lifetime of the wife and without issue, and the question was, whether the share of the daughter in her deceased brother's share was subject to the trusts affecting her original share. Sir L. Shadwell, V. C., decided in the negative, observing that it would be nothing but conjecture if he were to say that the testator meant his daughter to take her accruing share with the same limitations over to her children as her original share was subject to.

Unequal division.

Upon the same principle it is clear that, where the subject of gift is disposed of among the original objects in unequal shares, there is no necessary inference, in the absence of any declared intimation of intention to assimilate the accruing to the original shares, that the survivors are to take accruing shares in the same relative proportions. (*l*) [Neither will words creating a tenancy in common in a gift of original shares be extended by implication to accrued shares. (*m*) But in Eyre *v.* Marsden, (*n*) it followed from the construction put on the will by Lord Langdale, M. R., that the interest of F. in the accrued shares must be in proportion to his interest in the original shares.

Gift of accrued shares "in the same manner" as original.

Survivorship clauses are not often so split up as in Georges *v.* Georges: where as more commonly happens there is one general survivorship clause, the words "in manner aforesaid," or similar terms of reference occuring therein, will have the effect of sub*jecting all the accrued shares to the same terms, restrictions and limitations over as the original shares. (*o*)

"Shares" held to include original and accrued shares consolidated by previous provision.

And where a declaration, that accruing shares should be subject to the same trusts as original shares, was followed (in a settlement) by a clause which gave to each *cestui que trust* who should die without children power to appoint an aliquot part of her "share;" it was held by Sir J.

(*l*) Walker *v.* Main, 1 J. & W. 1, stated *post*.

[(*m*) Jones *v.* Hall, 16 Sim. 500; Leigh *v.* Mosley, 14 Beav. 605.

(*n*) 2 Kee. 564, *ante* p. *708; not appealed on this point, 4 My. & C. 231.

(*o*) Milsom *v.* Awdry, 5 Ves., Jr., 465, stated *ante* p. *690; Giles *v.* Melsom, L. R., 5 C. P. 614, 6 C. P. 532, 6 H. L. 24.

Parker, V. C., that the deed had so consolidated the accruing and original shares in the first place as to render it unnecessary to carry on separate accounts of them; and that the word "share," in the subsequent provision, might thus be held to include the whole fund which, under the previous trusts, belonged to either of the beneficiaries and her children. (*p*) And in In re Jarman's Trusts, (*q*) where, after a life estate in the whole to his wife, a testator bequeathed a sum of money to his three daughters in equal shares, and gave the residue amongst them in certain proportions, adding "the share or shares of my said daughters under my will to be for their sole and separate use;" and if any of them died without issue before the wife her or their share or shares, accruing as well as original, were given to the survivers or survivor; it was held by Sir W. P. Wood, V. C., that the words of the separate use clause were large enough to affect the accrued as well as the original shares. Though not distinctly assigned by the court as the reason for this decision there would seem in fact to have been a sufficient consolidation of shares within Sir J. Parker's principle. That the consolidating clause followed, instead of preceding, the clause in dispute was of course immaterial.

Survivorship amongst a more extensive class than the original donees.

Again, if there be a gift to several (but not all) of a class (as children) with a gift over in case of the death of any to "the surviving children," all the children will be included in the latter gift and not those only who partake of the original gift; although those who do not so partake are otherwise provided for. (*r*)

At what period class entitled to accruing shares is to be ascertained.

If the bequest is to several as tenants in common for life, and after the death of each his share is given to his children, but if he has no children then to the survivors for their respective lives and afterwards to their respective children; here the class of children to take an original share is fixed at the death of their parent; but a share accruing to the children of the same parent *on the subsequent death without children of another tenant for life will, if treated strictly as a new legacy, vest in a class to be fixed at the death of such other tenant for life. If, however, it should appear that the accruing shares are intended to go over with the original shares and to be consolidated therewith, it seems reasonable to hold that the accretions vest in the same class as the

(*p*) In re Hutchinson's Settlement, 5 De G. & S. 681.

(*q*) L. R., 1 Eq. 71.

(*r*) Carver *v.* Burgess, 18 Beav. 541.

original shares. A point of this kind occurred in In re Ridge's Trusts. (s) In that case (which has already been stated) one tenant for life died leaving issue, then another leaving none; and in the interval other issue of the first were born. The court having supplied cross-limitations between the stocks, which of course carried over accruing as well as original shares, held that the class of issue to take the accrued share must be ascertained at the same time as the class to take the original share, viz., the death of their own ancestor; otherwise a cardinal rule of construction would be contravened, viz., the rule that interests are to be vested as soon as they can be consistently with what the testator has said; (t) and moreover the gift of the whole to the issue of one tenant for life if only one left issue, would be contradicted. "Under this gift," said Sir W. James, L. J., "if one dies leaving issue and the others die afterwards without issue, the issue of the first take the whole: but if they are ascertained at the death of the survivor, it must be held that the interests which the class of issue ascertained at the first daughter's death take in her share are liable to be divested so as to let in other issue, a construction which the court would not readily be induced to adopt." It is submitted however that the decision rests more securely on the consolidation of the shares; for whatever construction is adopted with regard to the vesting of additional shares, it by no means of necessity governs the construction with regard to the divesting of that which is already vested.]

Effect where qualification is necessary to validity of gift of accruing shares.

Here it is proper to observe, that though a departure from the ordinary rules of construction, for the purpose of bringing a devise or bequest within due limits, is not an acknowledged principle of construction, indeed is always professedly discarded; yet it is impossible to deny that, where the bequest of the accruing shares would be void for remoteness, unless the qualifications applied in terms to the original shares are extended to such *accruing shares, the courts have lent a more willing ear to such construction than the preceding cases prepare us to expect. An example of this occurs in Trickey v. Trickey, (u) where a testator bequeathed the residue of his personal estate to trustees in trust for his daughter, and

Gift of accrued shares supported by engrafting thereon a qualification

(s) L. R., 7 Ch. 665, stated *ante* p. *561. See also Heasman v. Pearse, Id. 285, where the words "then living" were got over on much the same principle.

(t) But the accruing share cannot be *vested* before the contingency happens upon which the accruer takes place.]

(u) 3 My. & K. 560.

after her decease for all and every the child or children of his daughter, share and share alike, when they should respectively attain twenty-one, with maintenance in the meantime; and in case any of the said children should die under twenty-one, and leave one or more child or children *who should survive the testator's daughter* and live to attain twenty-one, such child or children to be entitled to his or their parents' share: provided also, that in case any child or children of his daughter should die before attaining twenty-one, the share or shares of such child or children should go to the survivor or survivors, and the issue of any deceased child or children who should marry and die under twenty-one, to be equally divided between them if more than one; the issue of any deceased child or children to stand in the place of the parent or parents, with a limitation over, *provided there should be no child of his daughter, or there being any such, no one of them should live to attain twenty-one, nor leave any issue who should live to attain that age.*

expressly applied to original shares.

By a codicil the testator willed that, on failure of children and grandchildren of his daughter, as in his will was expressed, his bank stock, &c., should be transferred to certain relations. It was contended that the testator's intention was that all such grandchildren of his daughter as should attain twenty-one should take a vested interest, and that the limitation over, which was to take effect only upon failure of such grandchildren, was too remote; but Sir J. Leach, M. R., observed that it was reasonable to intend that the testator meant that the same grandchildren, who, by the former clause, were to take their parent's original share, should take that portion of the share which accrued by the death of another child of the daughter without leaving issue, and which their deceased parent, if living, would have taken, namely, the grandchildren only *who should survive the daughter.* If the prior gifts were only in favor of grandchildren who should survive the daughter, the gift over must be intended to take effect upon the failure of the former gifts.

III. Another question which arises under gifts to survivors is, whether they mean survivors indefinitely or survivors at some *specific point of time. Where the objects are tenants in common, it was for a long period considered that indefinite survivorship being inconsistent with a tenancy in common, some period was to be found to which the words of survivorship could

To what period survivorship referable.

be referred. This reasoning, however, is obviously inconclusive; for although survivorship is not incident to a tenancy in common, yet there is no inconsistency between a tenancy in common and an *express* limitation to survivors. (*x*) The testator's intention that the property shall devolve to the survivors is better effected by an express gift to them than by a joint tenancy, the survivorship which is incidental to the latter being liable to be defeated by a severance of the tenancy.

Where the gift is *immediate.*

In seeking for a period to which the words of survivorship could be referred, the obvious rule where the gift took effect in possession, immediately on the testator's decease, was to treat these words as intended to provide against the death of the objects in the lifetime of the testator, the devise affording no other point of time to which they could be referred; accordingly we find this to be the established construction.[4]

Thus, in Lord Bindon *v.* Earl of Suffolk, (*y*) where a testator be-

(*x*) See judgment in Doe d. Borwell *v.* Abey, 1 M. & Sel. 428; [Taaffe *v.* Conmee, 10 H. L. Cas. 78.] Sometimes a gift to survivors, accompanying a joint tenancy, is considered as merely expressive of the *jus accrescendi* which is incident to such a devise. See Doe *v.* Sotheron, 2 B. & Ad. 628.

4. In the following devises the words of survivorship have been held to relate to the time of the testator's death: In trust for testator's surviving children until the youngest attain twenty-one, Hempstead *v.* Dickson, 20 Ill. 193; to testator's "surviving children" after a life estate, Ross *v.* Drake, 37 Penna. St. 373; to testator's "surviving children or their heirs" after a life estate, Buckley *v.* Read, 15 Penna. St. 83; Martin *v.* Kirby, 11 Gratt. 67; to his "surviving heirs," Passmore's Appeal, 23 Penna. St. 381; or "surviving sons," Drayton *v.* Drayton, 1 Desaus. 324; to his "sons or the survivors of them," to be divided when the youngest shall attain twenty-one, Lawrence *v.* McArter, 10 Ohio 37; to the "children of A or the survivors of them," Mowatt *v.* Carow, 7 Paige 339; to "the surviving children of A," Young *v.* Robinson, 11 Gill & J. 328; so after a life estate to several, "or to the survivor or survivors of them," Moore *v.* Lyons, 25 Wend. 119; or to A "and her six children and the survivor or survivors of them," Dominick *v.* Moore, 2 Bradf. 201. But a devise "to the surviving children of my sister A, not knowing all their names," was referred to the date of the will in Morse *v.* Mason, 11 Allen 36. So to A for life, with remainder to "her now surviving children or any of them that may be alive at her death or the heirs of any that may be dead at the time of executing this my last will," "executing" being here interpreted "carrying into effect," Scott *v.* Guernsey, 48 N. Y. 106, affirming 60 Barb. 163.

(*y*) 1 P. W. 96. But see Hawes *v.* Hawes, 1 Wils. 165, 3 Atk. 523, where the testator devised an estate to his four younger children in fee as tenants in common, and not as joint tenants, *with benefit of survivorship;* and Lord Hardwicke held, that inasmuch as personal estate was bequeathed to them, with a limitation to the survivor, if any of them died *under age and unmarried*, the devise of the real estate was to receive the same construction.

queathed £20,000 (due to him from the crown) to his five grandchildren, share and share alike, equally to be divided between them, *and if any of them died, to the survivors and survivor of them;* Lord Cowper said, that by the first words it was very plain that the legatees were tenants in common, and by the subsequent words it must be intended, if any of them should die *in the lifetime of the testator.* This decree, however, was reversed in D. P., on the ground that the words in question referred not to the death of the testator, but to the time of receiving the money, which was a debt due from the crown of rather a desperate nature; but the principle of Lord Cowper's decision has since been repeatedly recognized. (*z*)

Survivorship referred to *death of testator.*

The more recent case of Smith *v.* Horlock (*a*) presents an *instance of a similar construction in reference to real estate. A testator gave all his real and personal property to be equally divided between his two children in common *and to the longest liver,* in fee simple (there were some intervening words, which are immaterial to the point in question); and it was held that one child who alone survived the testator took the whole.

[And the charging of a general fund with the payment of certain life annuities, subject to which the fund is bequeathed to the "surviving" children of A, would probably be held not to vary the construction: *i. e.,* the fund would vest in possession in such children as survived the testator, subject only to the particular charges.] (*b*)

Notwithstanding prior gifts of annuities.

Where, however, the gift was not immediate (*i. e.,* in possession), there being a prior life or other particular interest carved out, so that there *was* another period to which the words in question could be referred, the point was one of greater difficulty. In *these* cases, indeed, as well as in those of the other class, the courts for a long period uniformly applied the words of survivorship to the death of the testator, on the notion (as already observed) that there was no other mode of reconciling them with the words of severance creating a tenancy in common. The weight ascribed to this argument, how-

Where gift not *immediate.*

(*z*) See Roebuck *v.* Dean, 2 Ves., Jr., 267; Russell *v.* Long, 4 Ves. 553; [Bass *v.* Russell, Taml. 18; Clark *v.* Lubbock, 1 Y. & C. C. C. 492; Ashford *v.* Haines, 21 L. J., Ch. 496.]

(*a*) 7 Taunt. 129; but see Barker *v.* Giles, 2 P. W. 280, *post;* Blisset *v.* Cranwell, 1 Salk. 226; Doe d. Borwell *v.* Abey, 1 M. & Sel. 428, *post.*

[(*b*) See Lill *v.* Lill, 23 Beav. 446; and an analogous point, *ante* p. *158.]

ever, was still more extraordinary in these than in the former cases; for, even if *indefinite* survivorship were inconsistent with a tenancy in common (but which it clearly was not), yet surely there could be no incongruity between such an interest and a limitation to the survivors *at a given period;* nevertheless, decision rapidly followed decision, in which, on reasoning of this kind, survivorship was held, in cases of this sort, to refer to the period of the testator's decease.

Survivorship referred to the death of the testator.

One of the first of these cases is Stringer *v.* Phillips, (*c*) where £100 was bequeathed to five persons at the decease of testator's sisters L. and C., (*d*) equally to be divided between them, *and the survivors and survivor of them;* and if A., one of the five, died before marriage, her share to go over to another; and it was decreed that they took this £100 as tenants in common, and that the limitation to the survivors must be construed to be in*serted to give it to such as were the survivors *at the death of the testator*, and to prevent a lapse.

So, in Rose d. Vere *v.* Hill, (*e*) where the testator devised his lands to his wife for life, and after her decease to his five children (naming them,) *and the survivors and survivor of them*, and the executors and administrators of such survivor, *share and share alike, as tenants in common and not as joint tenants;* Lord Mansfield and the other judges of K. B., held that these words were inserted to carry the property to the survivors, in case of the death of any of the devisees in the devisor's lifetime, and that they took as tenants in common.

Again, in Wilson *v.* Bayly, (*f*) where a testator bequeathed certain leasehold estates, in the event of his two sons dying unmarried and in case neither of them should have issue, to his three daughters *and the survivors and survivor of them* and their assigns, as tenants in common and not as joint tenants. It was contended, on the one hand, that the words of survivorship were intended to give estates to such of them as should be living when the contingency happened, who were then to take as tenants in common; but the House of Lords adjudged that each of the daughters surviving the testator took a vested interest in

(*c*) 1 Eq. Cas. Ab. 293; but see 1 Cox's P. W. 97, n.

(*d*) It is probable these persons were legatees for life, but it does not appear in the note extracted by Mr. Cox. In Eq. Cas. Ab. the legacy is inaccurately stated as given immediately to the five legatees. [Note, however, that they all survived testator's sisters.]

(*e*) 3 Burr. 1881.

(*f*) 3 B. P. C. Toml. 195, reversing decree in the Irish Chancery; see the will more fully stated, *ante* vol I., p. *518.

one-third share, which on her death before the contingency happened was transmissible to her representatives. It is evident, therefore, that the House considered the words of survivorship to refer to the death of the testator.

So, in Roebuck *v.* Dean, (*g*) where a testatrix bequeathed certain stock in the funds in trust for her niece for life, and after her decease directed that it should be equally divided among her (testatrix's) brother and four sisters, "and in like manner *to the survivors or survivor of them;*" Lord Loughborough held that these words referred to survivors *at the death of the testatrix* (being introduced to prevent a lapse,) and not to the death of the niece.

Down to this period the decisions are uniform in referring survivorship to the death of the testator. In the interval, however, between the last and the next case, a doctrine was broached in Brograve *v.* Winder, (*h*) also decided by Lord Loughborough, *which made a considerable inroad upon this rule of construction; but as it will be more convenient to reserve these cases for future consideration as a separate class, we now proceed with the decisions on the general rule.

Of these cases the next is Perry *v.* Woods, (*i*) where a testator gave £1500 S. S. Anns. upon trust to pay the dividends to A for life, and after her decease to B for life, and after his decease to transfer the principal to C, D and E, in equal shares and proportions, and to the survivor or survivors of them who should be living at their decease. He gave another sum of stock to a different person for life, with a similar ulterior gift among these persons and the survivors. He then gave another sum of £1500 S. S. Anns. to E for life, and after her decease to and among her children, to be paid them at twenty-one; and in case E should die and leave no child or children, he directed his executors to pay the principal unto C and D, *share and share alike, or to the survivor of them.* Sir R. P. Arden, M. R., held that C and D *surviving the testator* were entitled to the last £1500 as tenants in common. He thought that he was precluded from adopting any other construction by Stringer *v.* Phillips, (*k*) there being no single circumstance of distinction, except that in some particular cases, as to other legacies, the testator had referred survivorship to the time of division.

Circumstance of there being an *express* bequest to survivors at the division.

(*g*) 2 Ves., Jr., 265. As to this case, see Sir W. Grant's judgment in Halifax *v.* Wilson, 16 Ves. 171; and Sir J. Leach's in Cripps *v.* Wolcott, 4 Mad. 15, *post* p. *733.

(*h*) 2 Ves., Jr., 634, *post* p. *728.

(*i*) 3 Ves. 204.

(*k*) *Ante* p. *722.

Sir W. Grant, however, seems to have considered that this circumstance favored the construction adopted; for, (*l*) in allusion to Perry *v.* Woods, he said, "Where the testator meant the survivorship to refer to the death of the tenant for life, he expressly declared that intention in two instances, and the omission of that reference in another instance *is an indication of a different intention.*" (*m*)

"With benefit of survivorship," referred to death of testator.

Again, in Maberly *v.* Strode, (*n*) the words, "with benefit of survivorship," were held to contemplate the death of any of the objects in the lifetime of the testator. A testator devised his real estate to trustees, to sell and invest the produce with his personal estate, in trust for his son S. for life, and after his decease for his children. But in case his son should die unmarried and without issue, or they should die, being sons before twenty-one, or being daughters before twenty-one or marriage, then in trust to transfer such funds unto his (testator's) nephews *W. and J. and unto his niece C., in equal proportions share and share alike, his, her and their issue or the issue of either of them to take their parent's share, *with benefit of survivorship* to his nephews and niece. The question was, whether these words referred to survivorship at the death of the testator or of the son. Sir R. P. Arden, M. R., held that they referred to survivorship at the death of the testator, being introduced to prevent a lapse. (*o*)

It is remarkable, however, that the same learned judge in Russell *v.* Long (*p*) inclined to hold words of survivorship to refer to the death of the tenant for life, not to that of the testator, observing that the latter construction was unnatural, and was not to be adopted if any other could be,—a doctrine which it is difficult to reconcile with Perry *v.* Woods.

Survivorship referred to death of testator.

The next case in the series is Brown *v.* Bigg, (*q*) where a testator bequeathed the interest of his stock in the funds to his wife for life, provided that if she married again she should be entitled to one moiety only of the interest, the other moiety to be applied to the use of the testator's nephews and nieces "after mentioned, in manner and proportions therein expressed;" and, as to the residue of his personal estate, and the produce of some real,

(*l*) See Newton *v.* Ayscough, 19 Ves. 537.

(*m*) But see Daniell *v.* Daniell, 6 Ves. 297, *post* p. *730.

(*n*) 3 Ves. 450.

(*o*) But see Gibbs *v.* Tait, 8 Sim. 132, where a different construction was given to a similar expression.

(*p*) 4 Ves. 551.

(*q*) 7 Ves. 279.

he gave the interest to his wife for life, under the like restrictions as before in case of a second marriage, and after the decease of his said wife without issue by him, the testator left the whole of his personal estate to his several nephews and nieces after named, viz., A, B and C, and the four children of D, *to be divided amongst them and the survivors of them, share and share alike.* A having died in the lifetime of the widow, her personal representatives claimed her share as vested at the decease of the testator; and Sir W. Grant so decreed, though during the argument he observed that the general leaning of the court is against construing the words of survivorship to relate to the death of the testator, if any other period can be fixed upon, the testator generally supposing the legatee will survive him. If he intended his wife to have the whole for life, the probable conclusion was that he meant the time of division.

Sir W. Grant's remark on Brown v. Bigg.

In explanation of the seeming inconsistency between his remarks during the argument and his decree, his Honor *observed, on a subsequent occasion, (r) that he "found the result of the authorities *contrary to what had fallen from the court during the argument* founded upon what Lord Alvanley had said in one of the cases; *and that in a great majority of them survivorship had been referred to the period of the testator's death.*"

Survivorship referred to death of testator—real estate.

This seems to be the latest case in which the construction which reads words of survivorship as referring to the period of the testator's death, has been applied to bequests of personal estate. Examples, however, of its application to devises of real estate occur in several subsequent cases: as in Garland v. Thomas, (s) where the devise was to R. C. for life, remainder to his first and other sons in tail, remainder to his daughters in tail, remainder to the testator's niece S., and his two nieces E. and A., *and the survivor and survivors of them*, and the heirs of the body of such survivor or survivors, as tenants in common and not as joint tenants: and for want of such issue over: and Sir J. Mansfield and the court of C. P., on the authority of Bindon v. Suffolk, (t) Stringer v. Phillips, (u) and Rose v. Hill, (x) held that the limitation to the survivors was intended to provide for the event of the death of any of the devisees *in the testator's lifetime*, and that all surviving the testator took as ten-

(r) Shergold v. Boone, 13 Ves. 375.
(s) 1 B. & P. N. R. 82.
(t) *Ante* p. *721.
(u) *Ante* p. *722.
(x) *Ante* p. *723.

ants in common. [However, the only point decided was, that the testator did not intend an indefinite survivorship; for all the three nieces survived R. C., who died without issue; so that whether the death of the testator, or of R. C. so dying, was the period to which survivorship was referable, was immaterial to the determination of the case.]

So, in Edwards *v.* Symons, (*y*) where a testator devised certain lands which he was entitled to on the death of his mother to trustees, upon trust to receive and apply the rents for the maintenance, education and advancement of his six children (naming them), and immediately on E. (the youngest of the children) attaining twenty-one years, then he devised the said premises to his said six children *and the survivors and survivor of them* their heirs and assigns forever, to hold as tenants in common and not as joint tenants. By a codicil the testator extended the devise to another child. Five of the children survived the testator, of whom one died before E. attained twenty-one; and it was held that one-fifth share descended to his heir-at-law, the *court being of opinion that the words of survivorship referred to *the death of the testator*, and not to the period of E.'s attainment to twenty-one.

Applicability of the rule to a devise to a class.

In both the preceding cases it will be observed, the devise was to individuals *nominatim*. But in Doe d. Long *v.* Prigg, (*z*) the applicability of the construction to a devise *to a class* came under consideration. The testator devised real estate to his mother *for life*, and after her death to his wife for life, and from and after the decease of his mother and wife, he gave and bequeathed all the above-mentioned premises unto the *surviving* children of J. and W., and to their heirs forever; the rents and profits to be divided between them in equal proportions. The question was, to what period the words "surviving children" referred; Bayley, J. (who delivered the judgment of the court) said,—"The testator's death is in this case so much the more rational period, so much the more likely to have been intended, and falling in, as it does, with the rule of law for vesting estates as soon as they may, instead of leaving them contingent, that we are of opinion that the estate here vested in remainder immediately upon the testator's death, in the then children of J. and W."

Remarks upon the preceding cases.

This case closes the long series of authorities in favor of the construction in question, which might seem to have established, if reiterated adjudication could settle any point, that a gift to several objects as tenants in common, and

(*y*) 6 Taunt. 213.

(*z*) 8 B. & Cr. 231.

the survivors and survivor of them, vested the subject of gift absolutely in the objects living at the death of the testator, the words of survivorship being referable to that period. The sequel will serve to show that no rule of construction, however sanctioned by repeated adoption, is secure of permanence, unless founded in principle; for to the inadequacy of the grounds upon which the rule was established may, it is conceived, be ascribed, not only the frequent agitation of the question evinced by the multitude of cases just stated, but the sweeping and, as we shall see, sometimes groundless exceptions engrafted upon it, which at length rendered it doubtful whether such a rule of construction any longer existed, or rather occasioned its total subversion, in reference at least to personal estate. For the reader, on a perusal of the cases which remain to be stated, will probably find himself impelled to the conclusion, that where there is a gift of personal estate to a person for life or any other limited interest, and after the determi-*nation of such interest to certain persons *nominatim*, or to a class of persons as tenants in common, *and the survivors of them*, these words are construed as intended to carry the subject of gift *to the objects who are living at the period of distribution*.[5] This result, however, was not attained until after many gradations. In the first instance survivorship was held to relate to the period of distribution and not to the death of the testator, on the ground that the subject of gift (being the produce of lands devised to be sold) was not *in esse* until this period.

Survivorship referred to *period of distribution*.

5. In the following cases the survivorship words were construed to refer to the death of the first taker, or the happening of the contingency on which the gift was to take effect: To A for life, and on his death to testator's "surviving children," Hulburt *v.* Emerson, 16 Mass. 244; Olney *v.* Hull, 21 Pick. 311; Den *v.* Sayre, Pen. (N. J.) 598; Seddel *v.* Wills, Spencer 223; Williamson *v.* Chamberlain, 2 Stockt. 373; Branson *v* Hill, 31 Md. 181; or "surviving children or the heirs of their bodies," Anderson *v.* Smoot, Speers Eq. 312; or "children or the survivors of them," Sinton *v.* Boyd, 19 Ohio St. 30; so to A, B and C for life, and on the death of the survivor "to the surviving children of B and C," Slack *v.* Bird, 8 C. E. Gr. (N. J.) 238; or to A in tail, and if he die without issue, to testator's "surviving children," Holcombe *v.* Lake, 4 Zab. 686, affirmed 1 Dutcher 605; or his own "surviving brethren," Couch *v.* Gorham, 1 Conn. 36; or "surviving children of B," Westbrook *v.* Romeyn, Baldwin C. C. 196; to A for life, and on his death to his "surviving children," Tucker *v.* Stites, 10 Geo. (Miss.) 196; Robertson *v.* Wilson, 38 N. H. 48; Morton *v.* Morton, 8 Barb. 18; Matter of Ryder, 11 Paige 185; Smith *v.* Block, 29 Ohio St. 488; to be divided "when my youngest child reaches the age of 21, among my surviving children," Wren *v.* Hynes, 2 Metc. (Ky.) 129; Clark *v.* Clark, 3 Bradf. 32 ("among my children or the survivors.")

Thus, in Brograve *v.* Winder, (*a*) where a testator devised his real estates to A for life, with remainder to his first and other sons in tail male, and in default of sons of A, gave his estates to trustees to sell, and willed that the money arising by such sale or sales should be equally distributed among the three sons and daughter of W., *or the survivors or survivor of them*, and that such fourth or other part as the daughter should become entitled to should be settled in a certain manner; Lord Loughborough admitted that in general it was perfectly true that these words would not prevent the vesting at the death of the testator, but the circumstances of this will, he said, gave it a very different effect. "In this will (he observed), the penning of which is very particular, when once you fix the intention that they shall take it as money, which is clearly the sense of this will, there is no gift till the distribution; the object of the distribution is pointed out to be among the persons named, 'or the survivors or survivor;' that excludes the possibility of taking in, as objects of the distribution, persons who are dead."

Subject of gift being the produce of a future sale.

So, in Newton *v.* Ayscough, (*b*) where a testator gave to A £400 consols, for her to receive the interest during her life, and after her decease the £400 to be sold and divided among his residuary legatees, *or the survivor of them, share and share alike;* and he appointed B, C and D residuary legatees of his will, share and share alike. On a question whether one of the legatees dying in the lifetime of A was entitled, Sir W. Grant said, "To what period survivorship is to relate, depends not upon any technical words, but upon the apparent intention of the testator, collected either from the particular disposition or the general context of the will."—"Here is a direction to trustees at the death of the tenant for life to sell the fund, and divide the produce among his residuary legatees, 'or the survivor of *them, share and share alike.' That naturally points to the period of sale as the period to ascertain who are the persons to take, and brings this case much nearer Brograve *v.* Winder (*c*) than Perry *v.* Woods. (*d*) In Brograve *v.* Winder Lord Loughborough's opinion was that the survivor at the time of the sale, not at the death of the testator, was intended. In Perry *v.* Woods the testator had by his will furnished evidence of his own intention with regard to the meaning of the word

Survivorship referred to the period of distribution.

Sir W. Grant's judgment in Newton v. Ayscough.

(*a*) 2 Ves., Jr., 634.
(*b*) 19 Ves. 534.
(*c*) *Ante* p. *728.
(*d*) *Ante* p. *724.

'survivor.'"—"The case of Russell *v.* Long, (*e*) decided by Lord Alvanley soon afterwards, shows that he did not conceive there was any rule requiring survivorship to be generally referable to the death of the testator, but thought it might refer either to that period or the death of the tenant for life, according to the apparent intention of the testator."

The inconsistency between the expressions of Lord Alvanley in Russell *v.* Long, and his decisions in Perry *v.* Woods (*d*) and Maberly *v.* Strode, (*f*) has been already pointed out. The latter show that he *did* consider survivorship in these cases to be generally referable to the death of the testator, as the only mode of reconciling it with the tenancy in common; and even Sir W. Grant himself, in Shergold *v.* Boone, (*g*) stated this to be the result of the authorities; which opinion accords with his decision in Brown *v.* Bigg.

It is a circumstance worthy of remark, that down to this period, in all the cases where survivorship had been referred to the time of division, the expression was "*or* the survivor," although no attempt was made to found a distinction on this particular phraseology.

Survivorship referred to the period of distribution on special grounds.

Another instance in which Brograve *v.* Winder has been followed is Hoghton *v.* Whitgreave, (*h*) where a testator gave his real and the residue of his personal estate to his wife for life, and after her decease to trustees, upon trust to sell the real estate; and directed that the money arising from the sale, as also the rents from the death of his wife until the sale, as well as the residue of his personal estate, should be paid and equally divided among his nephews and nieces after mentioned, *and the survivors or survivor of them*, viz., A. M., &c.; and he thereby bequeathed the same to them, *and to the survivors or survivor of them*, after the decease of his wife, and in manner aforesaid. *The question was, whether the nephews and nieces surviving the widow were entitled, to the exclusion of those who died in her lifetime. Sir T. Plumer, V. C., held that the former *were* entitled, considering the case as not distinguishable from Brograve *v.* Winder. (*k*) "The subject matter," said his Honor, "is not to be converted into money till after the death of the tenant for life; it is then that for the first time anything is given to the trustees. It is given upon trust to be converted into money, and then

(*d*) *Ante* p. *724.
(*e*) *Ante* p. *725.
(*f*) *Ante* p. *724.
(*g*) 13 Ves. 375.
(*h*) 1 J. & W. 146.
(*k*) *Ante* p. *728.

to be divided. Thus, not only was there no bequest till the widow's death, but the subject matter did not until then exist in the shape and form in which it is given. It is given to those persons and the survivors or survivor of them, and seems to fall under the general rule, that legacies given to a class of persons vest in those who are capable of taking at the time of distribution. (*l*) Here he mentions them *nominatim*, but he then takes off the effect of that by adding the words, 'and to the survivors or survivor.' He cannot mean such as survive him, for the governing clause, that containing the gift, refers to the death of his wife as the period when it is to operate." And he afterwards adverted to the subsequent gift, "in manner aforesaid," as precluding the argument that it was to go to those who survived him after the death of his wife.

As to there being another bequest *expressly* to survivors *at distribution.*

Another ground upon which a gift to survivors has been held to refer to survivors at the period of distribution, and not at the death of the testator, is that some other subject matter given to the same objects is *expressly* limited in that manner.

Thus, in Daniell *v.* Daniell, (*m*) where the testator bequeathed certain stock in trust for his wife for life, and after her decease to his children, but in case his wife should have no child of his at her decease living, then as to £1000, part thereof, to pay the interest to his sister J. D. during her life, and at her decease the £1000 to be paid equally between *her said two sons J. and F., or the whole to the survivor of them.* In the preceding part of the will another sum of £1000 was given to trustees, in trust, after the decease of his wife without issue by him, to pay his said sister the interest for life, and after her decease the principal to be paid to the said J. and F., share and share alike, *in case they should be living at their mother's death;* but in case either of them should die before her, then the whole to be paid to the survivor. F. died in the lifetime of the testator's widow; at *her death, the testator's sister J. D. being also dead, a bill was filed by J. for the first-mentioned £1000, as the survivor at the death of the last surviving tenant for life, which was resisted by the representatives of F., claiming as one of the survivors at the death of the testator. Sir W. Grant said, "It is clear the testator meant the survivor at the time of the division. He did not conceive that would take place till both his wife and Mrs. D. (*i. e.*, J. D.,) were dead; he

(*l*) This is a mistake; see *ante* p. *156. (*m*) 6 Ves. 297.

conceived the deaths would happen in the order of the limitation. *The mode in which he disposed of the other two sums confirms, instead of opposing, this construction,* showing that the period of division was the period at which he intended it to vest. *He had the same meaning as to this fund:* he who is alive when the division takes place takes the whole of the capital."

Remarks upon Daniell v. Daniell.

The reasoning of this case agrees with that of Lord Hardwicke in Hawes *v.* Hawes, (*n*) and it would seem with Lord Alvanley's in Perry *v.* Woods; (*o*) but stands singularly contrasted with Sir W. Grant's own observations upon the latter case in Newton *v.* Ayscough already noticed, where he considered that survivorship being expressly made referable to the death of the tenant for life in another bequest, raised an argument in favor of a *different* construction in the bequest in question, where such expressions were omitted. (*p*) The only circumstance of distinction is, that in Perry *v.* Woods the other bequest was to different objects.

Survivorship referred to period of distribution, there being another gift *expressly* to survivors at that period.

The doctrine of Daniell *v.* Daniell was referred to with approbation and adopted in Wordsworth *v.* Wood, (*q*) where a testator gave certain real and personal property to his wife for life, and after her decease to his *then* surviving children, share and share alike, independently of the rental of his said estates, which he gave to *his surviving female children.* Lord Langdale, M. R., held that a daughter who died in the lifetime of the widow was excluded from the rents, and one of the grounds of this construction he considered to be, that such a daughter was not an object of the immediately preceding devise of the estates, the testator's apparent intention being by the second gift merely to exclude the sons, and not to introduce a new class of daughters. He said, "The rule is, that where an interest is given to a person for life, and after his death to his surviving children, those only *can take who are alive when the distribution takes place." Upon appeal, Lord Cottenham also considered that, independently of the general rule, there was sufficient ground for holding the deceased daughters to be excluded, according to Brograve *v.* Winder, Newton *v.* Ayscough, Hoghton *v.* Whitgreave, and Daniell *v.* Daniell; more particularly

(*n*) *Ante* p. *721, n.

(*o*) See *ante* p. *724. See also Sheppard *v.* Lessingham, Amb. 122, *ante* vol. I., p. *487.

(*p*) See also Campbell *v.* Campbell, 4 B. C. C. 15.

(*q*) 2 Beav. 25, 4 My. & Cr. 641, [1 H. L. Cas. 129.]

expressing his concurrence in the line of argument pursued by Sir W. Grant in the last-mentioned case. [The decision was affirmed in D. P. on the same grounds.]

Remarks upon Brograve v. Winder, Newton v. Ayscough, Hoghton v. Whitgreave, and Daniell v. Daniell.

The general rule referring survivorship to the death of the testator was, it will be observed, departed from in the preceding cases only upon particular grounds; and these cases, by resting the construction on the special circumstances, might seem indirectly to afford a confirmation of that rule. Their effect, however, in consequence of the indefinite and questionable nature of the exceptions which they went to establish, evidently was to strike at the root of the rule itself, and to prepare the way for its abandonment in cases where such circumstances did not exist.

History of the present doctrine.

It is curious to observe, in the history of this rule of construction, the steps by which an established doctrine is overturned. Lord Loughborough, we have seen, first departed from it, founding that departure upon a circumstance which furnished no real distinction, but at the same time with an anxious recognition of its authority. (r) Sir W. Grant in Daniell v. Daniell, (s) probably disapproving of the reasoning which led to the adoption of the rule, as well as of the distinction which had been engrafted on it, applied the principle of the exception to a case not warranted by the terms of the former decision; and although he did not treat the established rule with the same professions of reverence and submission as Lord Loughborough, yet, by placing his own case upon special grounds, impliedly bowed to its authority. In Newton v. Ayscough, (t) however, he went a step further, and, while he applied Lord Loughborough's construction in Brograve v. Winder to an exactly similar case, boldly denied the existence of any contrary rule of interpretation. Its overthrow, we shall find, was completed in a subsequent case, remaining to be stated, in which another learned judge not only disavowed the rule, the foundation of which had been thus gradually sapped, but confidently laid down an opposite doctrine.

Survivorship referred to the time of distribution.

*The case here referred to is Cripps v. Wolcott, (u) where the testatrix gave and appointed her real and personal estate, in trust for her husband for life, and after his decease directed that her personal estate should be equally divided

(r) See Brograve v. Winder, *ante* p. *728.

(s) *Ante* p. *730.

(t) *Ante* p. *728.

(u) 4 Mad. 11. See also Browne v. Lord Kenyon, 3 Mad. 410.

between her two sons A and B, and C her daughter, *and the survivors or survivor of them, share and share alike.* A died in the lifetime of the husband; B and C, as the survivors at his death, claimed the whole. Sir J. Leach said, "It would be difficult to reconcile every case upon this subject. I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, *the survivorship is to be referred to the period of division.* If there is no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. This was the case of Stringer *v.* Phillips.(*x*) *But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole of the legacy.* This is the principle of the cited cases of Russell *v.* Long, (*y*) Daniell *v.* Daniell, (*z*) and Jenour *v.* Jenour. (*a*) In Bindon *v.* Lord Suffolk, (*b*) the House of Lords found a special intent in the will, that the period of division should be suspended until the debts were recovered from the crown, and they referred the survivorship to that period. The two cases of Roebuck *v.* Dean and Perry *v.* Woods, before Lord Rosslyn, (*c*) do not square with the other authorities. *Here there being no special intent to be found in the will, the terms of survivorship are to be referred to the death of the husband who took a previous estate for life.*"

General rule as stated by Sir J. Leach.

Although this seems to have been at the time a very bold decision, involving as it did direct opposition to no less than nine cases (one decided by the House of Lords,) (*d*) and although it is to be regretted, that the actual state of the authorities was not brought to the attention of the learned judge, yet the rule of construction which he propounded seems to be so reasonable and convenient for general application, that it is not surprising that subsequent judges have been favorably disposed to its adoption, as will appear by the cases about to be stated.

Remarks on Cripps *v.* Wolcott.

*Thus, in Blewitt *v.* Roberts, (*e*) where a testator gave an annuity

(*x*) This is not correct; see *ante* p. *722.

(*y*) *Ante* p. *725.

(*z*) *Ante* p. *730.

(*a*) *Post* p. *738.

(*b*) *Ante* p. *721.

(*c*) Perry *v.* Woods was decided by Lord Alvanley.

(*d*) Wilson *v.* Bayly, 3 B. P. C. Toml. 195.

(*e*) 10 Sim. 491, 4 Jur. 501, 9 L. J., Ch. 209; [affirmed by Lord Cottenham, Cr. &

Survivorship referred to period of distribution.

to his wife for life, and directed that after her death the annuity should be equally divided between his children (naming six) *or the survivors or survivor*. Sir L. Shadwell held that such of the legatees as survived the widow were entitled in equal shares. (*f*)

The construction adopted in this case seems to agree with and to be supported in its full extent by the earlier case of Pope *v.* Whitcombe, (*g*) which is another important authority for the general rule which refers survivorship to the period of distribution. The testatrix gave the interest of the residue to her brother, during his life, and after his death she gave the residue to her executors, in trust for four persons by name, *and the survivors and survivor of them*, share and share alike, to be paid to them respectively when they should attain twenty-one, with interest in the meantime. Of these four persons, two died during the life of the brother; Lord Eldon held that they did not take vested interests in any part of the residue, but that the whole belonged to the two survivors; such being, in his opinion, the intention of the testatrix.

[So in Neathway *v.* Reed, (*h*) where a testator bequeathed the interest of his funded property to his sister for her life, and after her decease such property to be equally divided between her *surviving* children; in another part of his will he had, amongst other legacies, made an immediate bequest to his sister's surviving children of £30 each. Lord Cranworth with K. Bruce and Turner, L. JJ., decided that the word "surviving" in the former bequest referred to the sister's death. The L. C. said, "According to the old principles of law the rule was that the period of vesting should be at the moment of the testator's death. Now, however, in putting a construction on the word 'surviving' reference is had to the *intention* of the testator as discoverable from the whole will. In my opinion when an estate is given to a person for life, and after his death to his surviving child-

Ph. 274; but as he held the children entitled for life only, (as to which see Bent *v.* Cullen, L. R., 6 Ch. 235,) was not the survivorship indefinite? See *post*.

(*f*) See also Gibbs *v.* Tait, 8 Sim. 32, which, however, was based on the authority of Brograve *v.* Winder and that class of cases; Wordsworth *v.* Wood, *ante* p. *731.]

(*g*) 3 Russ. 124.

[(*h*) 3 D., M. & G. 18. See also Williams *v.* Tartt, 2 Coll. 85; Eaton *v.* Barker, Id. 124; Buckle *v.* Fawcett, 4 Hare 536; Hesketh *v.* Megennis, 27 Beav. 395; Young *v.* Davies, 2 Dr. & Sm. 167; Thompson *v.* Thompson, 29 Beav. 654; Whitton *v.* Field, 9 Beav. 368; Taylor *v.* Beverley, 1 Coll. 108; In re Pritchard's Trusts, 3 Drew. 163. The last three cases were aided by context.

ren, those only of the children who survive the *tenant for life will take." And Sir G. Turner observed that if the gift had been to the sister for life and after her decease to "her children" without the word "surviving," the children living at the testatrix's death would have taken: that some effect must be given to the word "surviving," and that it must mean surviving the sister. (*i*) The court also thought their decision could not be influenced by the fact that in the immediate bequest the same word must have a different meaning; for in that place there was no other meaning which it could have. (*k*)

Sir G. Turner's observation is applicable only where the gift is to a class, or to individuals as joint tenants. But it is not to be understood as confining the rule to such cases. In Cripps *v.* Wolcott itself and other cases already noticed the gifts were to individuals as tenants in common; and in Hearn *v.* Baker (*l*) where a testator gave all his estate and effects to his wife for life, and after her death bequeathed a sum of stock to his five cousins (naming them) *or the survivors of them* as tenants in common; it was held by Sir W. P. Wood, V. C., that "survivors" had reference to the death of the widow, and that one cousin who alone survived her was entitled to the whole fund. So in Vorley *v.* Richardson (*m*) where there was a general bequest in trust for the testator's wife until his youngest child should attain twenty-one, and on that event happening to be divided amongst his said wife and all his children (naming them) as tenants in common, *with benefit of survivorship;* it was held that the words of survivorship being connected with the period of division must *prima facie* be taken to refer to that period.

So where the income of personal property is bequeathed to several persons for life, and after the death of all to their surviving children, those children alone take who are living at the death of the last surviving tenant for life. (*n*) And where the *gift is to A for life, and at

(*i*) See also In re Crawhall's Trusts, 8 D., M. & G. 480.

(*k*) See also Young *v.* Davies, 2 Dr. & Sm. 167, 170, and more fully 32 L. J., Ch. 372; also Salisbury *v.* Petty, 3 Hare 86, 93; and cf. Gooch *v.* Slater, 3 Jur. (N. S.) 881, where the phrase "with benefit of survivorship" used with reference to four different gifts, some immediate and others not, but all vested, was referred to testator's death in every instance.

(*l*) 2 K. & J. 383.

(*m*) 8 D., M. & G. 126; also Naylor *v.* Robson, 34 Beav. 571.

(*n*) Stevenson *v.* Gullan, 18 Beav. 590. See also per Wood, V. C., In re Hopkins' Trusts, 2 H. & M. 411. Gummoe *v.* Howes, 23 Beav. 184, 192, is not inconsistent with the rule. The gift was to A and B for their lives as tenants in common; and in case of the death of either without issue, to the survivor; but if either should die

his death to B for life, and at his death to the surviving children of C, only those children are entitled who are living at the actual period of distribution, whether A or B dies last.] (o)

Result of the cases as to personalty.

In this state of the authorities one scarcely need hesitate to affirm, that the rule which reads a gift to survivors simply as applying to objects living at the death of the testator is confined to those cases in which there is no other period to which survivorship can be referred; and that where such gift is preceded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution, and of those only.

If tenant for life dies before testator, death of the latter is the period.

[If the tenant for life dies before the testator, the death of the latter, as the period of actual distribution, will also be regarded as the period of survivorship. (p)

The same principle is clearly applicable where there is no prior particular bequest, but the gift to the legatees among whom the survivorship is to take place includes all of the prescribed class who may come into existence before a stated period. Thus, if a testator make a bequest to all the children of A who shall be born in their father's lifetime or within nine months after his death, as tenants in common, with benefit of survivorship; those only who survive their father or the nine months named are entitled to a share.] (q)

Distinction in regard to real estate rejected.

But the cases of Garland v. Thomas, Edwards v. Symons, and Doe v. Prigg (the last decided after Cripps v. Wolcott), made it doubtful whether this rule applied to devises of real estate. It is difficult to discover any ground for making them the subject of a different rule, unless a reason can be found in the greater tendency in devises of real estate towards a vesting of the inte-

leaving issue, her share was given to her children: and *after the death of both* the whole was to be conveyed, transferred, or paid to the heirs of their bodies (construed children) share and share alike, or to the survivors or survivor of them: but if A and B should die without children, then over. It was held that a child of A, which survived its parent but died before B, was entitled to a share. In fact, the gift over after the death of both, which, standing alone, might have given B a life interest in the share of A after her death, and have pointed out the death of B as the period of survivorship for all the children, was explained by the previous gift over, on the death of each parent, of her share to her children; so that survivorship in the several families was referred to a different period for each family.

(o) Knight v. Poole, 32 Beav. 548; In re Fox's Will, 35 Beav. 163; Howard v. Collins, L. R., 5 Eq. 349. But see Drakeford v. Drakeford, 33 Beav. 43.

(p) Spurrell v. Spurrell, 11 Hare 154.

(q) Hodson v. Micklethwaite, 2 Drew. 294. See also Blewitt v. Roberts, Cr. & Ph. 274, 283 (as to the £100 annuity); Davies v. Thorns, 3 De G. & S. 347.

rests of the devisees. [The distinction was repeatedly pronounced to be unsound; (r) and at length in In re Gregson's *Trusts, (s) it was held by K. Bruce and Turner, L. JJ., to be untenable. There a testator devised real estate to his wife for life, and on her death "to be shared share and share alike amongst the following persons, or the survivors of them, viz." (naming them); and it was decided that the question being one of construction, and of the testator's intention, a forced interpretation could not be put on the words in order that the remainder might by early vesting escape the liability to destruction and other inconveniences of tenure incident to contingent remainders: and that here, no less than in the case of personal estate, survivorship must be referred to the death of the tenant for life.

Rule in Cripps v. Wolcott yields to contrary intention.

The rule in Cripps v. Wolcott is not only settled, but is one which the court never seeks to evade by slight distinctions. But, of course, it must yield to a context clearly indicating a contrary intention. (t) Thus, in Shailer v. Groves, (u) where a testator bequeathed £1000 stock to his wife for her life, at her decease one-half of the produce to be received and divided amongst his *surviving* brothers and sister or (v) *their* issue, share and share alike, Sir J. Wigram decided that the word "surviving" had reference to the testator's death. He said: "It is clear that the testator must have intended a period of distribution later in point of time than the gift of the subject of distribution, and that he intended to substitute for the primary objects of his gift the issue of such of them as should die

To surviving brothers or (by substitution) to their issue.

(r) Wordsworth v. Wood, 1 H. L. Cas. 129; Buckle v. Fawcett, 4 Hare 536.

(s) 2 D., J. & S. 428, reversing Wood, V. C., who yielded to the authorities, 33 L. J., Ch. 531. Sir E. Sugden also had treated Doe v. Prigg as a binding authority, see 1 D. & War. 499.

(t) See per Wood, V. C., 2 H. & M. 414.

(u) 6 Hare 162.

(v) The report 6 Hare gives "*and* their issue." But 11 Jur. 485 and 16 L. J., Ch. 367 give "or," and the briefs of counsel in the cause (now in the editor's possession) agree with them. These latter reports, however, differ from 6 Hare in a still more remarkable manner: for they represent the decision to have been, that the word "surviving" referred to the period of distribution; and the decree is drawn up in accordance with this latter view. But Mr. Hare's report of the judgment is probably correct; the word "their" being of equal force with the word "them" in Tytherleigh v. Harbin, 6 Sim. 329, and Gray v. Garman, 2 Hare 268. See also Sir J. K. Bruce's judgment in Kidd v. North, 3 D., M. & G. 951, 2d paragraph.

between the time of the gift and the time of the distribution."—"The fund must be divided in equal parts among the brothers and sisters surviving at the death of the testator. The issue of those who died in the lifetime of the tenant for life leaving issue will take the shares of the parents for whom they are substituted." (x)

*So in Rogers v. Towsey, (y) where a testator bequeathed to each of his two sisters the interest of £5000 stock for her life, and as each died the said stock to be equally divided between the testator's nieces A, B, C, D and E, *or the survivors of them:* he bequeathed one moiety of the residue to A, and the other moiety equally between B and C. "In case his niece C should not *survive him*, her children" to stand in her place, "and the same of any other of his nieces who might marry and leave children." The same judge, assuming the general rule to be as stated in Cripps v. Wolcott, held that the last clause showed a special intent on the testator's part to refer the word "survivors" to his own death.]

Rule where gift to survivors is contingent.

It is to be observed, that where the gift to survivors is to take effect *upon a contingency*, none of the reasoning (infirm as that reasoning is) upon which it was held to refer to survivors at the death of the testator applies; for it cannot for an instant be contended that a tenancy in common is inconsistent with such a qualified survivorship. The only question, therefore, in such a case is, whether the gift was meant to extend to survivors indefinitely, (*i. e.*, whenever the contingency should happen,) or is restricted to survivorship within a given period after the testator's decease.

Survivorship confined to the death of the tenant for life.

Thus, in Jenour v. Jenour, (z) where a testator bequeathed £400 long anns. to his sister for life, and declared that £200 should be his brother's for life if he survived his sister, and after his decease should be equally divided between his two nephews J. and M., *and go to the survivor of them in case his brother should leave no lawful issue;* if he should, such issue should be in place of their father with regard to the said annuities. The sister and brother having both died in the lifetime of J. and M., M. claimed to be absolutely entitled to a moiety. The ques-

(x) See also In re Hopkins' Trust, 2 H. & M. 411; Evans v. Evans, 25 Beav. 81. As to the assumption in the latter case that "death without issue" meant death *in the lifetime of the tenant for life*, see Olivant v. Wright, 1 Ch. D. 346, *post* ch. XLIX. And see and consider Blackmore v. Snee, 1 De G. & J. 455.

(y) 9 Jur. 575; cf. Bouverie v. Bouverie, 2 Phil. 349.]

(z) 10 Ves. 562. [See also Bird v. Swales, 2 Jur. (N. S.) 273.]

tion seems to have been whether survivorship was indefinite, or referable to the death of the surviving legatee for life. Sir W. Grant, observing that he was always indisposed to indefinite survivorship, adopted the latter construction; that is, that the legatees should take absolutely if living at the death of the tenant for life; if then dead leaving issue, then the issue to be entitled in the place of their parent. On appeal Lord Eldon was of the same opinion.

Executory devise to A, B and C, *or the survivors.*

*In Roe d. Sheers *v.* Jeffery, (*a*) it seems to have been taken for granted that an executory limitation for life, to certain persons or the survivors, was not confined to survivors at the happening of the contingency; but, as the devise had not at the death of the object fallen into possession, it does not appear whether survivorship was considered as indefinite, or as restricted to this period. The devise was to A for life, remainder to B in fee; but in case B should depart this life and leave no issue, then that the premises should return unto E., M. and S., *or the survivors or survivor of them, equally to be divided between them.* E., M. and S. survived the testator, but one of them died in the lifetime of A, but *after* the contingency had happened by the death of B without issue.

The two surviving tenants for life recovered the property, on a different point of construction; (*b*) and no objection seems to have been made to their claim to the entirety, on the ground that the limitation to survivors was restricted to survivors at the death of the testator, or at the happening of the contingency. [Indeed, considering that the estates in the first instance devised to E., M. and S. were for life only, it is probable even if the question had been raised, that the survivorship would have been held indefinite, so that whenever either of them died the survivors would take his share as a *remainder; i. e.,* "survivor" would have been read not as referring to any particular event, but in its natural sense (*c*) of that individual who, out of several individuals named should turn out to be the longest liver.]

Executory devise to sur-

But in Doe d. Lifford *v.* Sparrow (*d*) an executory limitation to survivors was held to refer to the death of the testator (the devise being to A and B in fee as tenants in common, and

(*a*) 7 T. R. 589.

(*b*) *Ante* p. *513.

[(*c*) See per Lord Westbury, Taaffe *v.* Conmee, 10 H. L. Cas. 78; also Maden *v.* Taylor, 45 L. J., Ch. 572; Nevill *v.* Boddam, 28 Beav. 554; Haddelsey *v.* Adams, 22 Beav. 266; and see analogous cases, Smart *v.* Clark, 3 Russ. 365; Tilson *v.* Jones, 1 R. & My. 553; Bowen *v.* Scowcroft, 2 Y. & C. 640; all stated *post* ch. XLVIII., *ad fin.*]

(*d*) 13 East 359.

vivor referred to death of testator.

in case of the death of either without children to the survivor); but this construction was aided by the context, particularly by a gift over of the entire property, in case *both* the devisees were dead *at the time of the decease of the testator* without children, from which the court inferred, that in the clause in question, he contemplated death at the same period.

Contingent gift to survivors, when not restricted to period of distribution.

[But where the original remainder is in terms limited upon the happening of an event, (as attaining twenty-one,) the non-*happening of which occasions the gift over, survivorship is almost necessarily referable to that event, whenever it happens. (*d*)

And generally if there is no special ground for restricting it, a gift to survivors on a contingency would seem to extend to survivors indefinitely, *i. e.*, whenever the contingency happens. It will appear in the next chapter (*e*) that if there be a gift to A for life, remainder to B, and if B dies without children then to C, the gift over *prima facie* takes effect whether the contingency happens before or after the death of A: and although, where the remainder is to several, with a gift over to survivors, words are frequently used which import a final division of the property and a closing of the trust at the death of the tenant for life, so as to restrict the operation of the gift over to that period, (*f*) yet if there are no restrictive words, it would seem to follow from the rule referred to that "survivors" in this gift over means living when the contingency happens, whenever that may be. (*g*)

Survivorship referred to time when contingency happens, though gift restricted.

Even assuming that a gift to survivors upon an express contingency is to be restricted to the period of the prior estate, so that those who survive that period take indefeasibly, the question still remains whether they *need* so survive, or whether it is sufficient that they are living when the contingency happens. The cases will be found to favor the latter position.

Thus, in Crowder *v.* Stone, (*h*) already stated, Lord Lyndhurst

[(*d*) Carver *v.* Burgess, 18 Beav. 541, 7 D., M. & G. 97.

(*e*) O'Mahoney *v.* Burdett, L. R., 7 H. L. 388.

(*f*) Olivant *v.* Wright, 1 Ch. D. 346.

(*g*) This would seem to be the rule where the original gift is immediate, see per Lord Hatherley, Bowers *v.* Bowers, L. R., 5 Ch. 244, 247. In Clark *v.* Henry, L. R., 11 Eq. 222, 6 Ch. 588, the prior legatees were "to have the control" of their shares at twenty-five, survivorship was therefore referred to that age.

(*h*) 3 Russ. 217, *ante* p. *691. Marri-

decided that the shares which became subject to the operation of the bequest to the survivor and survivors were divisible among such of the legatees as were living at the time *when the events happened* on which the shares were to go over respectively.

So, in Bright *v.* Rowe, (*i*) also stated above, it must have been assumed that the survivorship intended was a survivorship at the time when the several contingencies happened; since otherwise the M. R. could not have decided (as he did) that the personal representative of the child who died without issue in 1829, before the shares became payable, was entitled under the *gift to "survivors" to an interest in the share of the child who died in 1826.

And in Ive *v.* King, (*k*) where a testator devised and bequeathed property to his wife for life, remainder to trustees in trust to sell, and gave one moiety of the proceeds to his wife's sister and brothers, (naming them,) as tenants in common; "and in case of the death of any or either of them, (which was held to mean death before the wife, as expressed in the gift of the other moiety,) then their respective shares to their children, if any, and if not, then to the survivors of them, share and share alike." A, one of the brothers, died a bachelor before the testator in the wife's lifetime; and it was held by Sir J. Romilly, M. R., that another brother, who survived A and the testator, though he afterwards died in the wife's lifetime, was entitled under the gift to survivors to participate in the share of A.

Survivorship held to refer to the event.

It seems also that where the remainder is, not to several or the survivors, (as in Cripps *v.* Wolcott,) but to several, and *if any of them die* before the tenant for life, to the survivors, it will be held to mean survivorship *inter se* and not at the death of the tenant for life. Thus in White *v.* Baker, (*l*) a sum was given in trust for A for her life, and after her death in trust to pay the sum to B and C in equal shares, and

White v. Baker.

ott *v.* Abell, L. R., 7 Eq. 478, is *contra, sed qu.*

(*i*) 3 My. & K. 316, *ante* p. *711. See also Ranelagh *v.* Ranelagh, 2 My. & K. 441, *ante* p. *692; Fletcher *v.* Ashburner, 1 B. C. C. 497 (where the point appears to have been assumed.)

(*k*) 16 Beav. 46, 57. Note that the alternative gift to children, not being "in case any brother should *leave* children," did not assist the construction. Note also that "survivors" was held to denote a *class, i. e.*, to include none who did not also survive the testator, 16 Jur. 491; but see Willetts *v.* Willetts, 7 Hare 38.

(*l*) 2 D., F. & J. 55, reversing Romilly, M. R., 29 L. J., Ch. 577, 6 Jur. (N. S.) 209, whose previous decision in Cambridge *v.* Rous, 25 Beav. 409 ("the share of each who shall die to be divided among the survivors") appears to be discredited by this reversal.

in case of the death of either of them in the lifetime of A, then in trust to pay the whole to the survivor of them the said B and C, his executors, administrators and assigns. It was held by Lord Campbell, with K. Bruce and Turner, L. JJ., that on the death of B in the lifetime of A the whole vested absolutely in C, not liable to be divested if he afterwards died in the lifetime of A. Sir G. Turner said, "Where there is a bequest to A for life, and after his death to B and C or the survivor of them, some meaning must of course be attached to the words 'the survivor.' They may refer to any one of three events: to one of the persons named surviving the other; to one of them only surviving the testator; or to one of them only surviving the tenant for life: and in the absence of any indication to the contrary they are taken to refer to the last event, as being the most probable one to have been referred to. *But where, as in the present case, the bequest is to A for life and after his death to B and C, and in case either of them dies in the lifetime of A, the whole to the survivor, it is plain that the words in their natural import refer to the one surviving the other; and the question is not to which of the events above mentioned the testator intended to refer, but whether there is any context to alter the ordinary meaning of the words which he has used." He also thought the case was made stronger by the words "his executors," &c., being added to the gift in favor of the survivor; (*m*) in which he agreed with Lord Campbell. But he added that the case needed no such support, and he "preferred deciding it upon the more general ground."

Scurfield v. Howes.

Both judges pointedly approved of Scurfield *v.* Howes, (*n*) and treated it as directly in favor of their decision. There the bequest was to A for life, and after her decease to her two children share and share alike, but if either of them should die before the decease of their mother, the whole to the survivor of them. (*o*) Both died in A's lifetime, and it was held that the legacy belonged to the personal representatives of the survivor. It seems,

(*m*) As contrasted (it may be presumed) with their absence from the original gift to the two.

(*n*) 3 B. C. C. 90. See also per Shadwell, V. C., Antrobus *v* Hodgson, 16 Sim. 450. But this was heard as a short cause, and the successful party being legal representative of both B and C was entitled *quacunque via.*

(*o*) The words "of them" are supplied from R. L., 6 Jur. (N. S.) 592. But Lord Campbell stated the case without them, and in other cases they appear not to have weighed in favor of survivorship *inter se.*

therefore, that White *v.* Baker cannot fairly be said to have turned on the particular language of the will. (*p*)

The construction which reads survivors as those who are living when the contingency happens is confirmed if the gift to them is in the alternative with another which clearly points to that time; as, where the shares of any of the original legatees in *remainder are given over in case of their death *leaving* issue to such issue, but if they leave no issue, then to the survivors. (*q*)

Distinction between gift over of "share" of deceased legatee, and gift over of whole fund.

There is perhaps some difference between a gift to survivors of the whole fund and a gift to survivors of the share of the deceased legatee. In the former case the point of new departure is the death of the tenant for life, in the latter the death of the legatee. The former is therefore more favorable than the latter to reading "survivor" as "living at the death of the tenant for life." But in Scurfield *v.* Howes and White *v.* Baker, although the gift was of the whole, and not of the share, "survivor" was held to mean him who outlived the other legatee. In fact no such distinction has ever been judicially noticed; and the *ratio decidendi* in White *v.* Baker would seem to leave it little room to operate. It is therefore doubtful how far Watson *v.* England (*r*) can now be regarded as an authority. In that case a testatrix having a power to appoint a sum of £1500 appointed it to her husband for life, and after his death to be equally divided among the five

(*p*) See, however, per Wood, V. C., L. R., 1 Eq. 298. Upon the question discussed in the text, frequent reference is made to a Scotch case of Young *v.* Robertson, 4 Macq. 314, 337, 8 Jur. (N. S.) 825, where the testator (or truster) gave the residue of his estate in trust for his wife for life, and "to pay the same after the death of the longest liver of me and my said wife to and among" six persons (named); "declaring that if any of them should die without leaving issue before his or her share vest in the party or parties so deceasing, the same shall belong to and be divided equally among the survivors of" the six. A, one of the six, died without issue; afterwards B, another of them, died leaving issue; then the wife died. It was held in D. P. that B took no part of A's share. But none of the English cases in point were cited, nor was the question decided in them alluded to, the only contest being whether "survivors" meant living at the death of the testator (as had been decided in Scotland) or at the death of the wife, and no third construction being suggested. Strictly the decision bears only upon Scotch law; and although the Scotch and English rules on the subject were treated as identical, it is submitted that the case ought not to be considered as having *sub silentio* overruled the English decisions.

(*q*) Wilmot *v.* Flewitt, 11 Jur. (N. S.) 820. *Qu.* whether Cambridge *v.* Rous, 25 Beav. 409, *ante* p. *741, n. (*l*), is not inconsistent with this case also.

(*r*) 15 Sim. 1.

daughters of her sister: if any of the said daughters should die in the husband's lifetime leaving issue, such issue to take their mother's share; but in case any of them should die during the husband's lifetime without issue, then "the said sum of £1500 shall be divided, share and share alike, amongst the *surviving* said daughters." It was held by Sir L. Shadwell, V. C., after some fluctuation of opinion, that the husband's death was the time to which survivorship was to be referred.

What excludes the sense of survivorship *inter se*.

The sense of survivorship *inter se* is excluded where the vesting of the remainder or other future gift is originally postponed to the death of the tenant for life, (*s*) or other future event. (*t*) So, where there was a gift for life, with remainder in fee to three persons by name, and "in the event of the death of either in the lifetime of" the tenant for life, his share was to "be transferred to the survivors, and, *if only one should be living*, then to him or her so surviving;" it was held that this was not a survivorship among the remaindermen, but had reference to the death of the tenant for life. (*u*) In this case the concluding words seem to point clearly to one fixed period. And a similar consideration may probably explain another case (*x*) where, *after a life interest, the gift was to three persons by name, in equal shares "or in case of the demise of each or either of them to be divided between the survivors or survivor *or* their representatives. It was held that survivors meant living at death of the tenant for life, and that as all three were dead, the original gift was not defeated. The words appear to mean, "to the survivors or survivor if any, but *if none* then to the representatives of the original legatees," which must necessarily have reference to one fixed point. So if there be a gift over of the whole in case all the legatees (amongst whom survivorship is to take place) should die before the tenant for life, those only who survive him will take, since the final gift over explains what is meant by the indefinite terms of survivorship previously used. (*y*)

It is inevitable that the meaning of a word which is so absolutely dependent on the context for any meaning at all should sometimes

(*s*) See Essex *v.* Clement, 30 Beav. 525.

(*t*) In re Hunter's Trusts, L. R., 1 Eq. 295.

(*u*) Littlejohns *v.* Household, 21 Beav. 29.

(*x*) Page *v.* May, 24 Beav. 323; but as the successful claimant was legal personal representative of all three, the point here considered did not require decision.

(*y*) Daniel *v.* Gosset, 19 Beav. 478. Compare Bouverie *v.* Bouverie, 2 Phil. 349.

have to be spelt out from ambiguous expressions. Thus in Maddison v. Chapman, (z) where a testator gave all his property in trust, upon his younger daughter attaining twenty-one, to be valued and divided into three equal parts without selling the land; one part to be for his wife and another for each of his two daughters, and at the death of his wife her share to be divided between the daughters; with a proviso that if either daughter should die *before a division of the property* should have been made as directed, leaving no surviving issue, then the part of the deceased should be given *to her surviving sister;* but if either of them should die and leave surviving issue, then her part should be equally divided amongst her surviving children; and until the younger daughter attained twenty-one the income was to be applied for the benefit of the wife and daughters. Both daughters died unmarried before the widow, the younger under age; and it was held by Sir W. Wood, V. C., that there was no survivor within the proviso, and that the original gift to the daughters, which he held to be vested, remained intact. Where there is a gift to A for life, he observed, and after the death of A to B and C and the survivor of them, the testator must, in the survivorship clause, be conceived as contemplating personal enjoyment by the person indicated; survivorship is therefore referred to the period of possession. In the event of both dying before the period of division, the testator could have *no reason for preferring the one who happened to be the longer liver, (a) for he did not know which it would be: there was no assignable motive for his giving the whole to that one, except the improbable wish that the interest should be vested at the earliest possible period. In White v. Baker the L. J. had considered that the express words, "if either of them die in the lifetime of A," made a sufficient distinction. That decision had created some difficulty in his (the V. C.'s) mind, when coupled with the line of cases down to Wagstaff v. Crosby, (b) before K. Bruce, V. C., (one of the judges who decided White v. Baker,) and Page v. May. (c) In the case before him, he added, there was no third person, tenant for life: the mother and daughters were the objects both of the original gift and the gift over. Until the younger daughter attained twenty-one, the benefit was given in one

(z) 1 J. & H. 478.

(a) But here it was "if either die leaving no issue."

(b) 2 Coll. 746, *ante* vol. I., p. *829. The bequest was in the form first put by Sir G. Turner, viz., to several "and the survivors or survivor of them."

(c) 24 Beav. 323, as to which *vide sup.* p. *743.

way, afterwards in another to the same persons. There was, therefore, no question of vesting the interest at the earliest time, so as to make it independent of a collateral event, such as the death of a third person. (*d*) Throughout, and particularly in the expression, "the part of the deceased shall be given to her surviving sister," the testator was looking at what was to be done when the younger child attained twenty-one; if at that time either daughter was dead, her share was to be handed over to her issue, if any then surviving; if none, then to the other sister, if then surviving.]

Special gift to survivors explanatory of prior general one.

It sometimes happens that a testator, after giving to several persons and the survivors generally, goes on to make an express gift to survivors to take effect in a particular event, thereby explaining the sense in which he used the word in the former instance. As in Weedon *v.* Fell, (*e*) where A bequeathed a sum of money in trust for his wife for life, and after her decease to divide the whole among his four children, share and share alike, *and the survivors*, but not before they should have respectively attained twenty-one or days of marriage; for his intent was that, *if any of his four children should die before twenty-one or days of marriage*, then his, her or their share so dying should go and be equally divided *among the survivors*. It was held that a child *attaining twenty-one was entitled though she died in the lifetime of her mother.

Survivorship referred to majority in preference to another event.

Where the time of distribution depends upon the happening of two events, one of which is personal, and the other is not personal, to the legatees (as where the gift is to children attaining twenty-one, and the distribution is postponed until the youngest object attains that age [or until the death of a previous legatee for life,]) the court strongly inclines to construe a gift to the survivors as referring to the former event exclusively, in order to arrive at what is considered to be a more reasonable scheme of disposition than that of rendering the interests of the legatees liable to be defeated by the event of their dying before the time to which, for some reason irrespective of the personal qualifications of the legatees, the distribution was postponed.

(*d*) But White *v.* Baker turned wholly on the "natural import" of the words used.]

(*e*) 2 Atk. 123. [See also Rogers *v.* Towsey, *ante* p. *738.]

Thus, where (*f*) a testator devised certain leasehold property to his wife for life, then to his daughter for life, and at her death to her husband for life, and at his decease to a trustee upon trust to receive the rents for the benefit of all the children of the daughter. The testator then proceeded thus:—"And my further will is, that my said trustee shall from time to time, as the rents become due, pay unto such child or children a just proportion of such interest as they shall arrive at their age of twenty-one years, and to place the interest of the infants' shares in consols, for their own sole use and benefit, and so on alternately till the youngest child shall arrive at his or her age of twenty-one years, and then all the said children *or the survivors* of them to be let into full possession of all the said estates, share and share alike." The question was, at what time the interest of the children vested. Sir J. Leach, M. R., observed that the court would not, unless forced by the plainest words, adopt a construction by which the interest of a child of full age, and settled in life, would be divested, if he happened to die before the youngest child attained twenty-one: that here the word "survivor" admitted of another and more rational meaning, namely, surviving so as to attain twenty-one; that, therefore, every child attaining twenty-one acquired a vested interest in his proportion of the capital; and that the children who died before attaining twenty-one, took during their lives, a vested interest in that proportion of the rents and profits which corresponded to their presumptive shares; but that such interest determined on their deaths.

Survivorship referred to majority in preference to death of tenant for life;

*[And in Tribe *v.* Newland, (*g*) where a testator gave £3000 to his daughter for life, and after her decease in trust for her children, share and share alike, to be paid to such of them as should be sons at their ages of twenty-one years, and to such of them as should be daughters at their ages of twenty-one years, or respective days of marriage, with interest in the meantime for their maintenance, and with benefit of survivorship in the event of any of the said children dying without issue: it was held by Sir J. Parker, V. C., that the words of survivorship referred to the time of payment mentioned just before. He thought they formed part of a sentence providing for what was to be done *in the meantime*, until the shares became payable; and that the

(*f*) Crozier *v.* Fisher, 4 Russ. 398.

[(*g*) 5 De G. & S. 236; see also Knight *v.* Knight, 25 Beav. 111; Berry *v.* Briant, 2 Dr. & Sm. 1; In re Johnson's Trusts, 10 L. T. (N. S.) 455; Corneck *v.* Wadman, L. R., 7 Eq. 80.

court would not, without a much more clear indication of intention than was to be found in that will, adopt a construction which made the provision for children depend on the contingency of their surviving their parent; more especially where the testator had pointed out a period when the shares were to be paid.

Indeed, in Crozier *v.* Fisher, it was held that the children who survived the tenant for life were not entitled unless they attained the age of twenty-one; a decision which, as it might exclude some of the children, may be considered a pointed one.

The case is plainer where, after a previous life interest, the gift in remainder is in the first instance to such children as shall attain a given age; and there then follows a direction to pay at that age "with benefit of survivorship:" since the prior words being clear are not to be controlled by an ambiguity in the subsequent expressions. (*h*)

—by force of gift over on death of all under age.

In Salisbury *v.* Lambe, (*i*) where there was a gift over if no child attained twenty-one, this construction prevailed although there was no previous mention of that age. A testator gave a sum of money in trust for his five daughters, equally among them, and their respective children, to be placed out at interest with the approbation of each daughter as to her share; and he directed that if any of the five should die, her share should be in trust for her daughters and younger sons *and the survivors and survivor of them;* and if there should be no such daughter or younger son, *or all should die before twenty-one or marriage,* then *over; Lord Northington held that the words "survivors and survivor" could only mean to give cross-remainders to the children before the devise over took place, *i. e.,* before they attained twenty-one, and that after that age their shares were not divested by death in the mother's lifetime.

Contrary effect of gift over on death of all before tenant for life.

On the other hand, if the prior bequest is followed by a gift over on the death of all the previous legatees (among whom the survivorship is to take place) in the lifetime of the tenant for life, the death of the tenant for life is the period to which survivorship is to be referred. (*l*)

Again, in Turing *v.* Turing, (*m*) where a testator gave a sum of

(*h*) Reid *v.* Worsley, 14 Jur. 325. See also Hodgson *v.* Micklethwaite, 2 Drew. 294.

(*i*) 1 Ed. 465, Amb. 383. See also Bouverie *v.* Bouverie, 2 Phil. 349; Alty *v.* Moss, 34 L. T. (N. S.) 312.

(*l*) Daniel *v.* Gosset, 19 Beav. 478; Fisher *v.* Moore, 1 Jur. (N. S.) 1011.

(*m*) 15 Sim. 139.

money to trustees for his wife for life, and after her death, in trust, as to one-fifth of that sum, for his daughter for life, and upon her demise the interest to be appropriated for the use of any her child or children until they reached the age of twenty-one, and *then* the principal sum *to be paid to the survivor or survivors of the children* of his said daughter, share and share alike: it was held by Sir L. Shadwell, V. C., that the word "survivors" related to the daughter's death, and not to the children's majority. He distinguished Crozier *v.* Fisher, on the ground that there was in that case a clearly vested interest given at twenty-one, which the word "survivors" (rather ambiguously used) was not sufficient to divest.

Gift to survivors of a class, without previous gift to the class.

And in some other cases where the words of survivorship have not been distinctly connected with majority, they have been referred to the death of the tenant for life, or the time when the youngest child attained majority, as the case required.

Thus, in Huffam *v.* Hubbard, (*n*) where the gift was "to A for life, and at her decease to her surviving children when they should have attained their twenty-one years, share and share alike." Sir J. Romilly, M. R., said that Crozier *v.* Fisher was a peculiar case, and different from the one before him; and he held that only the children surviving A took, according to the rule in Cripps *v.* Wolcott, that survivorship has reference to the period of distribution.]

Or under a gift to A for life, and at her decease to her surviving children at twenty-one.

Where a gift is made to several persons as tenants in common for life, and the survivor, with a limitation over after the death *of the survivor, indicating therefore unequivocally that the survivor is to take *at all events*, the testator is considered to refer to survivorship indefinitely, and not to survivorship at his own death.

To several as tenants in common *for life*, and to survivor, with gift over *after death of survivor*.

Thus, in Doe d. Borwell *v.* Abey, (*o*) where the testator devised to his three sisters, for and during their joint natural lives, *and the natural life of the survivor of them, to take as tenants in common, and not as joint tenants;* and after the determination of their respective estates, then to trustees during the lives of his said sisters, and the

(*n*) 16 Beav. 579. See also Pope *v.* Whitcomb, 3 Russ. 124, *ante* p. *734; Dorville *v.* Wolff, 15 Sim. 510; Hind *v.* Selby, 22 Beav. 373.]

(*o*) 1 M. & Sel. 428.

life of the survivor of them, to preserve contingent estates; and after the respective deceases of his said three sisters, *and the decease of the survivor* of them, then over; Lord Ellenborough observed that, to take as tenants in common is, correctly speaking, repugnant to taking with benefit of survivorship; but if those words are understood to mean that they were to take it as tenants in common, which they might do with benefit of survivorship, then the only repugnance seemed to be in the words "and not as joint tenants." (*p*) "I would," he said, "preserve the words 'to take as tenants in common.' The words tenants in common are of a flexible meaning, and may be understood, that although they should take by survivorship as joint tenants, yet the enjoyment was to be regulated amongst them as tenants in common. The prevailing intention of the testator seems to have been, that the estate should not go over until the death of the survivor." And Bayley, J., observed with great truth, "A tenancy in common, with benefit of survivorship, is a case which may exist without being a joint tenancy, because survivorship is not the only characteristic of a joint tenancy." 6

Survivorship held to be indefinite.

It is evident, that, by "benefit of survivorship," the learned judge meant *a gift to the survivor;* and his observation goes to this: that although survivorship is not an *incident* to a tenancy in common, yet an express gift to survivors is consistent with it. It is observable, however, that there was no express gift to the survivor, but the court seems to have implied one. (*q*) The principle, however, is the same.

Remarks on Doe v. Abey.

It remains to be observed, that, in devises of estates of in*heritance, for the avowed purpose of reconciling words of division or severance with a gift to the survivor, the devisees have been held to be joint tenants for life, and tenants in common of the inheritance in remainder. 7

Words of severance confined to the inheritance.

(*p*) But are not these words susceptible of the same explanation? They were not to enjoy as joint tenants, with a right of accruer, but as tenants in common, with an *express* or implied limitation to survivors.

6. But see Adams *v.* Spaulding, 12 Conn. 359, where a legacy was to several for their life and the life of the survivor of them, with remainder to their children, an equal share to the children of each, and the children of the first taker who died were held to be entitled at once to their parent's share.

(*q*) This case may therefore be added to those cited *ante* vol. I., p. *542.

7. See Seibert *v.* Wise, 70 Penna. St. 147, where the devise was to "A and B

Thus, in Barker *v.* Giles, (*r*) where the testator devised his real estate to be sold to pay debts and legacies, and the surplus of the money arising from the sale to be laid out in lands, to be settled to the use of J. and R., *and the survivor of them*, their heirs and assigns forever *equally to be divided between them, share and share alike:* it was held that they were joint tenants for life, with several inheritances, so that by the death of J. in the lifetime of the testator R. took the whole for his life, and the devise of the moiety of the inheritance lapsed.

Limitation to survivor disregarded.

But in Blisset *v.* Cranwell, (*s*) where the testator devised to his two sons and their heirs, *and the longest liver of them, equally to be divided between them and their heirs*, after the death of his wife; it was held that though it was given to them and the survivor, yet that the last words (namely, the words of division) explained what the testator meant by the word "survivor," that the survivor should have an equal division with the heirs of him who should die first.

In Stones *v.* Heurtley (*t*) Lord Hardwicke recognized the authority of this case, and applied the same construction to a devise of the residue of the testator's estate, "to be equally divided among his three younger children, D. F. and M., *and the survivor of them*, and their heirs forever."

Observations on the two last cases.

The objection to the construction adopted in the two last cases is, that it renders the gift to the survivor wholly inoperative. Is is probable that the courts at this day would incline to construe such gift as intended to provide for the event of any of the objects dying in the lifetime of the testator, as in Smith *v.* Horlock; (*u*) at any rate in such a case as Stones *v.* Heurtley where there was no other period to which it could be referred. The other case, Blisset *v.* Cranwell, would raise the question (to which so considerable a portion of the present chapter has been devoted) whether it meant survivorship at that time or the period of division. Barker *v.* Giles is distinguishable, inasmuch as the words of severance were not, as in the other cases, *necessarily* applied to *the estate for life.

and their heirs, the survivors or survivor of them," and the survivorship words were confined in their effect to A and B, and not extended to their heirs.

(*r*) 2 P. W. 280, 9 Mod. 157, 14 Vin. 487, 2 Eq. Cas. Ab. 536, affirmed on appeal 3 B. P. C. Toml. 104. See also Folkes *v.* Western, 9 Ves. 456; [Haddelsey *v.* Adams, 22 Beav. 266.]

(*s*) 1 Salk. 226, 3 Lev. 373.

(*t*) 1 Ves. 165.

(*u*) 7 Taunt. 129.

The authority of this case was recognized in Doe d. Littlewood v. Green. (x)

[This chapter may, like the first section of it, be concluded with a caution. "This word 'survivor,'" said Sir W. P. Wood, V. C., "is certainly one that ought to be avoided by any person who is not a consummate master of the art of conveyancing, for I suppose no word has occasioned more difficulty."] (y)

(x) 4 M. & Wels. 229.
(y) In re Gregson's Trust, 33 L. J., Ch. 532.

*CHAPTER XLVIII.

WORDS REFERRING TO DEATH SIMPLY, WHETHER THEY RELATE TO DEATH IN THE LIFETIME OF THE TESTATOR.

"In case of the death," &c., to what period referred.

Where a bequest is made to a person, with a gift over *in case of his death*, a question arises whether the testator uses the words "in case of," in the sense of *at* or *from*, and thereby as restrictive of the prior bequest to a life interest, *i. e.*, as introducing a gift to take effect on the decease of the prior legatee under all circumstances, or with a view to create a bequest in defeasance of or in substitution for the prior one, in the event of the death of the legatee in some contingency. The difficulty in such cases arises from the testator having applied terms of contingency to an event of all others the most certain and inevitable, and to satisfy which terms it is necessary to connect with death some circumstance in association with which it is contingent; that circumstance naturally is the time of its happening; and such time, where the bequest is immediate (*i. e.*, in possession,) necessarily is the death of the testator, there being no other period to which the words can be referred. [1]

Where the bequest is immediate.

1. So, too, Briggs *v.* Shaw, 9 Allen 516; Fulton *v.* Fulton, 2 Grant Cas. 28; Ash *v.* Coleman, 24 Barb. 645; Traver *v.* Schell, 20 N. Y. 89; Hamilton *v.* Boyles, 1 Brev. 414; Karker's Appeal, 60 Penna. St. 141.

And *a fortiori* where the will provides that a legacy "shall not lapse by the death of either of my said children but in case of such death" shall go over, Herbert *v.* Tuthill's Ex'r, Saxt. 141.

But in construing a will, it will be concluded that the testator contemplated and made provision for a lapse only when there is a clear intimation to that effect, Cowley *v.* Knapp, 13 Vroom 297. In which case it was said by Dixon, J.: "Now, in the present case, there is not only a contingency suggested by the circumstances of the testatrix, different from the death of her husband in her own lifetime, but the very words in which she refers to the contingency provided for, indicate that it was not such a lapse. She says, 'in case of anything happening us.' Here, as has been remarked, she puts herself and her husband in the same category. She no more refers to her surviving him than she does to his surviving her. The

Hence it has become an established rule, that where the bequest is simply to A, and *in case of his death*, or *if he die*, to B, A surviving the testator takes absolutely. (*a*)

question of survivorship was not in her thoughts at all. Her mind was on the travels abroad, for which she and her husband were preparing, and her purpose was that if, in the course of those travels, death should overtake them, then this will should be operative. This was the contingency which led her to speak of their death as a thing which might or might not happen; and it was very natural that, in view of it as a not improbable event, she should make the devise which this will contains. If it should come to pass, her husband would not have an opportunity of enjoying her estate under her earlier will, and there remained only her own kindred as objects of her affection and bounty. Having then this contingency to meet the expressions of the will, the arguments in favor of the notion that the testatrix contemplated only a lapse, are not strong enough to constrain the mind to adopt it. They do not amount to that 'very particular intimation of intention' which Lord Loughborough required to lead him to such a conclusion."

So where the gift is to testator's children, and if they should die before his widow, over, death in testator's lifetime, as well as after, is intended, Goodall *v.* McLean, 2 Bradf. 306; Ware *v.* Fisher, 2 Yea. 578; and in like manner where the gift is in remainder after a life estate to testator's "surviving children and the issue of such of them as may *have died* leaving issue," Teed *v.* Morton, 60 N. Y. 506.

In Theobald on Wills, p. 336, the following rules are laid down for the construction of such clauses:

"1. If there is an immediate gift to A, and a gift over in case of his death, or any similar expression implying the death to be a contingent event, the gift over will take effect only in the event of A's death before the testator. Lord Bindon *v.* Earl of Suffolk, 1 P. Wms. 96; Cambridge *v.* Rous, 8 Ves. 12; Crigan *v.* Baines, 7 Sim. 40; Taylor *v.* Stainton, 2 Jur. (N. S.) 634.

"So, too, a gift to several, and in case of the death of either in the lifetime of the others or other, was confined to the death before the testator, the death of one before the other being a certain and not a contingent event. Howard *v.* Howard, 21 B. 550.

"It makes no difference that the gift in case of A's death is to his children. Slade *v.* Milner, 4 Mad. 144; Schenck *v.* Agnew, 4 K. & J. 405.

"And this construction has been adopted where the gift over was 'in case of his decease or at his decease.' Arthur *v.* Hughes, 4 B. 506.

"But, as a rule, when there is a gift to A indefinitely, followed by a gift *at* his decease, A will take only a life interest. Constable *v.* Bull, 3 De G. & S. 411:

(*a*) Lowfield *v.* Stoneham, 2 Stra. 1261; [Northey *v.* Burbage, Pre. Ch. 471]; Hinckley *v.* Simmons, 4 Ves. 160; King *v.* Taylor, 5 Ves. 806; [Turner *v.* Moor, 6 Ves. 556]; Cambridge *v.* Rous, 8 Ves. 12; Webster *v.* Hale, Id. 410; Ommaney *v.* Bevan, 18 Ves. 291; Wright *v.* Stephens, 4 B. & Ald. 574. But see Billings *v.* Sandom, 1 B. C. C. 393; Nowlan *v.* Nelligan, Id. 489; Lord Douglas *v.* Chalmer, 2 Ves., Jr., 501; also Chalmers *v.* Storil, 2 Ves. & B. 222. As to a similar question arising on the word *or*, as in a gift to A "or his children," see *post* p. *758; also 1 Russ. 165.

The case of Trotter *v.* Williams (*b*) appears to have carried this construction to a great length. J. S. bequeathed to A £500, to B £500, and in like manner gave £500 apiece to five others, and *if any died*, then her legacy, and also the residue of his personal estate, to go to such of them as should be *then* living, equally to be divided betwixt them all. The court held *that these words referred to a dying before the testator, so that the death of any of the legatees after would not carry it to the survivors.

"If any die," held to mean in the lifetime of the testator.

The word "then" seemed to present some difficulty in the way of the construction adopted in this case. It followed immediately after the reference to the death of the legatees, and might with great plausibility have been held to refer to that event whenever it should happen; for a testator could hardly intend to make existence at a period anterior to his own death a necessary qualification of a legatee. This case exhibits the extreme point to which the construction in question has been carried.

Waters *v.* Waters, 26 L. J., Ch. 624; Adams' Trust, 14 W. R. 18; Joslin *v.* Hammond, 3 M. & K. 110; Reid *v.* Reid, 25 B. 469.

"2. A gift over 'in case of the death of A' has been construed as equivalent to 'after his death' in the following cases:

"*a.* Where the gift is only of a life interest, and the remainder would otherwise be undisposed of. Smart *v.* Clark, 3 Russ. 365; Tilson *v.* Jones, 1 R. & M. 553.

"*b.* Where the testator has given the absolute interest in another legacy in express terms, or has shown an intention to provide in all events for the person to take 'in case of the death of A,' or has expressly provided for the death of the legatee in his lifetime with regard to another legacy to the same legatee, there is ground for arguing that the gift over in case of the death of A was to take effect upon his death at any time. Billings *v.* Sandom, 1 B. C. C. 393; Nowlan *v.* Nelligan, 1 B. C. C. 489; Douglas *v.* Chalmer, 2 Ves., Jr., 501.

"3. If the gift is after a life estate, or a time is appointed for payment, the words 'in case of death' refer to death at any time before the vesting in possession, whether before or after the testator. Hervey *v.* M'Laughlin, 1 Pr. 264; Johnson *v.* Antrobus, 21 B. 556; Bolitho *v.* Hillyar, 34 B. 180; and see James *v.* Baker, 8 Jur. 750.

"It appears that a gift after a life interest to executors for their trouble, with a gift over in case of death, would *prima facie* mean death before the testator. Green *v.* Barrow, 10 Ha. 459.

"4. In the case of realty a devise to A simply in a will before the wills act, and in case of his death over, would perhaps be construed as to A for life, and after his death, over. Bowen *v.* Scowcroft, 2 Y. & C., Ex. 640; see, however, Wright *v.* Stephens, 4 B. & Ald. 574.

"On the other hand, if the devise gives A the fee, a gift over in case of A's death, will be held to refer to his death before the testator. Rogers *v.* Rogers, 7 W. R. 541."

(*b*) Pre. Ch. 78, 2 Eq. Cas. Ab. 344, pl. 2. [See also Taylor *v.* Stainton, 2 Jur. (N. S.) 634.

"In case of the death of either before the other."

[The rule has been held to apply where, after a gift to several, there was a bequest over "in case of the death of either *in the lifetime of the others or other;*" on the ground that the additional words did not make the event of death more contingent: it being a certainty that one must die in the lifetime of the other.] (c)

Cases of contrary construction.

There are, however, a few cases of immediate bequests in which the words under consideration have been construed to refer to death at *any* time, and not to the contingent event of death in the lifetime of the testator; but in each there seems to have been some circumstance evincing an intention to use the words in that rather than in the ordinary sense. Thus, the circumstance of the testator having bequeathed other property to the same person, to be "at her own disposal," has been considered to indicate that the testator had a different intention in the instance in question.

"*In case of* her demise," construed *at* her death.

In Billings *v.* Sandom (*d*) the testator, being at Gibraltar, bequeathed to his sister A (who was in England) £1000, and *in case of her demise* he gave to B £800, and to C £200. And he bequeathed unto A, whom he left executrix, whatever goods chattels and money should be due to him at the time of his decease, "*to be disposed of as she should think proper.*" Lord Thurlow said the testator intended to give a share of his bounty to his sister, and also to the others. The word "and" implied this; therefore she should take it for life, and then they should take it. As to the residuary devise, he meant that she should take that unfettered, at her own disposal, *but the other fettered *by the gift over.* This case has been referred to by Sir W. Grant (*e*) as decided upon the contrast afforded by the residuary clause.

"In case of death happening," &c. not confined to death *in lifetime of the testator.*

In Nowlan *v.* Nelligan (*f*) the bequest was in these words: "I give and devise unto my beloved wife H. N. all my real and personal estate: I make no provision expressly for my dear daughter, knowing that it is my dear wife's happiness, as well as mine, to see her comfortably provided for; *but in case of death happening to my said wife,* in that case I hereby request my friends S. and H. to take care of and manage to the best advantage for my daughter H. all and whatsoever I may

(c) Howard *v.* Howard, 21 Beav. 550. See Underwood *v.* Wing, 4 D., M. & G. 659, 8 H. L. Cas. 199 (Wing *v.* Angrave.)]

(d) 1 B. C. C. 393.

(e) 8 Ves. 22.

(f) 1 B. C. C. 489.

die possessed of." Lord Thurlow said it was impossible to tell with precision what was the testator's meaning, but he thought it too much to determine that "in case of death happening" meant dying in the husband's (*i. e.*, the testator's) lifetime; that therefore the meaning must be supposed to be in the event of her death *whenever it should happen.*

Sir W. Grant's remark on Nowlan v. Nelligan.

Of this case Sir W. Grant (*g*) has said, "It was evident that some benefit was intended for the daughter, but it was doubtful, as the extent was not clearly expressed, whether it could be made effectual by imposing a trust upon the will (*quære* wife?). Some benefit, however, was evidently intended for the daughter, and none could be assured to her except by limiting her mother to an interest for life."

These cases show that, in the opinion of Lord Thurlow, very slight circumstances suffice to make the words under consideration refer to death at any period; but no case has perhaps gone so far in adopting this construction as Lord Douglas *v.* Chalmer, (*h*) where a testatrix bequeathed her residuary personal estate for and to the use and behoof of her daughter Frances Lady D., and *in case of her decease* to the use and behoof of her (Lady D.'s) children, share and share alike, to whom her said trustees and executors were to account for and pay over and assign the said residue. By a codicil the testatrix gave a ring to her daughter Lady D., [and her wearing apparel to A, *or if A should be dead before her*, then over.] Lord Loughborough treated the notion, that the testatrix intended to provide for the event of Lady D. dying in her lifetime as contrary to the natural import of the words, and the distinction between the expression used, and *at* or *from* her decease, as too subtle. He also relied *upon the bequest of the ring in the codicil, which he observed was inconsistent with the supposition of her taking the whole interest in the residue; but, if she took it for life only, was very natural. And he observed that, under the circumstances which had happened, there was no other way by which the testatrix's bounty could reach the children, but by giving to Lady D. for life, and the capital to the children.

"*In case of*," construed *at*, death.

Remark on Lord Douglas v. Chalmer.

The reliance which was placed on these circumstances shows that Lord Loughborough did not intend to controvert the general rule, which is still more apparent from

(*g*) 8 Ves. 22.

(*h*) 2 Ves., Jr., 501.

his subsequent decision in Hinckley *v.* Simmons, (*i*) where a bequest of all the testatrix's "fortune" to A, and "*in case of* her death" to B, was held to confer an absolute interest on A surviving the testatrix. And this has been followed by several other decisions. (*k*)

No distinction in gifts to children.

It might seem, perhaps, that Lord Douglas *v.* Chalmer goes to establish an exception to the construction in question, where the first gift is to the parent and the second to the children; but this hypothesis is not only unsound in principle, but is contradicted by subsequent authority.

"But should she happen to die," held *not* to be restrictive.

Thus, in Webster *v.* Hale, (*l*) where the testator bequeathed certain stock for the use, exclusive right and property of his sister C, *but should she happen to die* then to her children; and the testator also bequeathed to his sister H. certain stock, *and in case of her death* to be divided among her children. Sir W. Grant held that C. surviving the testator was entitled to her legacy absolutely: he remarked that the word "but" strengthened this construction, being disjunctive, and implying that the children were to take in an event different from that on which the parent was to take. The other bequest to H., he observed, was in the very terms of Lord Douglas *v.* Chalmer, and, if that stood alone, he should be bound to the same construction; but he thought it sufficiently clear that C. was to take absolutely, and he could not from the very slight variation collect a different intention as to the other sister. It seems, therefore, that the M. R. did not think the gift of the ring in Lord Douglas *v.* Chalmer made any real difference.

"In case of her death" applied to testator's lifetime.

The absence of any distinction where the respective bequests are to parent and children is still further evident from Slade *v.* Milner, (*m*) where, under a bequest to A, "*and in case of her *death*" to be equally divided between her children, Sir J. Leach held that A, having survived the testatrix, took an absolute interest.

And it is of course equally immaterial that the substituted gift confers a life interest only on the first taker, and the ulterior interest on a third person. (*n*)

Another case exemplifying the construction now under consideration

(*i*) 4 Ves. 160.
(*k*) See cases cited *ante* p. *752.
(*l*) 8 Ves. 411.
(*m*) 4 Mad. 144; [and Schenk *v.* Agnew, 4 K. & J. 405.]
(*n*) Crigan *v.* Baines, 7 Sim. 40.

is Clarke *v.* Lubbock, (*o*) where a testator bequeathed the residue of his property to A and B, the interest to be paid for their support; *but in the event of the death of either*, the whole of the interest to be paid to the survivor; and on his or her demise, should they leave no children, then over: Sir J. K. Bruce held that, both A and B having survived the testator and left children, each was entitled to one moiety, the words in question being construed to refer to death in the testator's lifetime.

"In the event of the death of either" similarly construed.

[Where, however, a testator left all his property to his son charged with an annuity to his widow; "but should the hand of death fall on my *widow* and son," then over; Lord Cranworth held that the use of the word "widow" showed that the gift over could not have been intended to take effect on an event which was to happen in the testator's own lifetime.] (*p*)

Semble, where testator referred to the death of his *widow*.

But although in the case of an *immediate* gift it is generally true that a bequest over, in the event of the death of the preceding legatee, refers to that event occurring in the lifetime of the testator, yet this construction is only made *ex necessitate rei*, from the absence of any other period to which the words can be referred, as a testator is not supposed to contemplate the event of himself surviving the objects of his bounty; and, consequently, where there is another point of time to which such dying may be referred (as obviously is the case where the bequest is to take effect in possession at a period subsequent to the testator's decease,) the words in question are considered as extending to the event of the legatee dying in the interval between the testator's decease and the period of vesting in possession. 2

Rule where bequest is *future*.

(*o*) 1 Y. & C. C. C. 492. [See also Arthur *v.* Hughes, 4 Beav. 506; Duhamel *v.* Ardovin, 2 Ves. 163.

(*p*) Randfield *v.* Randfield, 2 De G. & J. 57. Compare Taylor *v.* Stainton, 2 Jur. (N. S.) 634, 635.]

2. Cowley *v.* Knapp, 13 Vroom 297. In this case the will was contingent, the testatrix and her husband being about to travel in Europe, and commenced with the words, "In case of anything happening us." In pronouncing the opinion of the court, it was said by Dixon, J.: "Since, in order to reach the conclusion that these words refer to death generally, whenever it may happen, it is necessary to reject, altogether, the idea of contingency which the words naturally import, I think that conclusion should be adopted only when all others are excluded, and I agree with the plaintiffs that it is not warranted in the present case. The testatrix had in mind something which might or might not happen. It is possi-

Thus, in Hervey *v.* M'Lauchlin, (*q*) where a testatrix bequeathed *two several sums of stock to a trustee, in trust to pay the dividends to T. for life, and after her death she gave the said two sums to G., E. and E., the three children of T., in equal shares, *and in case of the death of either of them*, the share of such as might die to go to and belong to the children, or child if but one, of the persons so dying. G. survived the testatrix, and died in the lifetime of the mother, the legatee for life; and it was contended that the words "in case of the death" of the legatees referred to a dying in the lifetime of the testatrix, and therefore that the children were not entitled. But the court considered that the intention of the testatrix was to substitute the children of those dying in the lifetime of the *legatee for life* in the place of their parent, and that therefore the parents took vested interests on the death of the testator, subject to be divested in the event specified.

"In case of the death" referred to period *of possession.*

On this principle, too, it should seem that in the case of a bequest to A at the age of twenty-one years, *and in the event of his death* then over to another, the words would be construed to mean, in the event of his dying under twenty-one at any time. (*r*)

[And the same construction has obtained where payment only, and not vesting, was postponed to a stated period. (*s*)

But such words are not confined to the event of death happening in the interval between the testator's decease and the period of vesting in possession; they apply also to the case of death happening before the testator's decease, which is, indeed, within the literal meaning of the words. Thus, in Le Jeune *v.* Le Jeune, (*t*) where a testator gave all his estates to his wife for life, and at her death to be sold, if necessary, and divided into five equal shares, one of which he directed to be paid to each of his four sons that should be living at her death; and in case

"In case of death" includes death in testator's lifetime.

ble to believe that she had in mind the death of her husband before her own; but many cases have held that this interpretation is to be entertained only when no other reasonable contingency can be discovered."

(*q*) 1 Pri. 264. See also Moon d. Fagge *v.* Heaseman, Willes 138; Galland *v.* Leonard, 1 Sw. 161; Girdlestone *v.* Doe, 2 Sim. 225, stated *ante* vol. I., p. *517; [Bolitho *v.* Hillyar, 34 Beav. 180; In re Nott's Trusts, W. N. 1875, p. 244.]

(*r*) See Home *v.* Pillans, 2 My. & K. 24.

[(*s*) James *v.* Baker, 8 Jur. 750. And see Monteith *v.* Nicholson, 2 Kee. 719, *post.*

(*t*) 2 Kee. 701; Cambridge *v.* Rous, 25 Beav. 417, 418; and see analogous cases (Walker *v.* Main, &c.,) cited ch. XLIX. § 1.

of either of their deaths his share to be paid to his issue, if no issue to be divided among the survivors. One of the sons died before the testator, leaving a child, and Lord Langdale, M. R., held that this child was entitled to the share which its parent would have been entitled to if he had been living at the wife's death.

In Green *v.* Barrow, (*u*) a testator gave £1000 in trust for one *for life, and after his decease gave £400, part of it, to A and B (who were two of his executors,) "part and part alike, that is say, £200 to A and £200 to B, for the trouble they may have in execution of this my will; but in case of either of their death, I give to the survivor, and in case of both their deaths to the heirs, executors and administrators of such survivor, £200 only." Sir W. P. Wood, V. C., thought that, if the will had ended with the gift to the survivor, death in the lifetime of the testator would have been the better construction, on account of the reason expressly given for the bequest being the trouble of executing the will, which the executor would incur immediately upon the testator's death: but the difficulty was on the subsequent words "in case of both their deaths," &c.: the testator must be taken to refer to the same time when he spoke of the death of both as when he spoke of the death of either; and if the words were referred to death in the lifetime of the testator, the effect would be that the testator gave a legacy to the representative of the survivor, though that survivor died in his lifetime; and the reason assigned for the gift altogether failed. He therefore held, though he confessed he did not feel clear upon the point, that on the death of one between the deaths of the testator and the tenant for life, the survivor became entitled to £200.]

Construction of words "in case of death" influenced by reason assigned for prior bequest.

And here it may be observed, that those cases in which the word "or" has been construed as introductory to a substitutional bequest (in which sense it seems to be tantamount to the words "in case of the death") present a distinction between immediate and future gifts similar to that which has been just pointed out. Thus, a legacy to A or to his children, or to A or his heirs, is construed as letting in the children or next of kin ("heirs" being in reference to [such a gift of] personal estate construed as synonymous with *next of kin*) in the event of A dying in the lifetime of the testator; while, on the other hand, a bequest to A for life, and

"Or" used synonymously with *in case of.*

(*u*) 10 Hare 459.]

after his decease to B or his children, is held to create a substitutional gift in favor of the children of B, in the event of B dying in the lifetime of A. (x) [And where two legacies are given by the same will to A or his issue, one immediate, the other after a life estate, the words *of substitution refer in the former case to the death of the testator, and in the latter to the death of the tenant for life. (y) The same words thus *operate* differently according as they are applied to the one legacy or the other.]

Distinction where prior gift is expressly for life.

It should be noticed that the construction of the words, "in case of the death," which makes them provide against the event of the legatee dying in the testator's lifetime, applies only when the prior gift is absolute and unrestricted, and not where such legatee takes a life interest only; for, if a testator bequeaths the interest of a sum of money to A expressly for life, "and in case of his death" to B, the irresistible inference is, that these words are intended to refer to the event on which the prior life interest will determine, and that the bequest to B is meant to be, not a substituted but an ulterior gift, to take effect on the death of A *whenever that event may happen.* [3]

Thus, in Smart *v.* Clark, (z) where a testator gave to his son E., who was then at sea, the interest of £500 stock during his life, if he came to claim the same within five years after the testator's decease; but *if he should die*, or not come to claim the same within the time limited, then he gave the said stock to the children of his daughter A., with the interest that might be due thereon. E. claimed within the five years, and received the dividends until his death, when the children of A. filed a bill to obtain a transfer; and Sir J. S. Copley, M. R., on the authority of Billings *v.* Sandom, (a) held that they were entitled.

It is singular that the M. R. did not advert to the circumstance of

(x) *Vide* cases cited vol. I., p. *517; [also Burrell *v.* Baskerfield, 11 Beav. 525, which was brought within the rule by reading "and" as "or." In re Dawes' Trusts, 4 Ch. D. 210, seems *contra, sed qu.*

(y) Salisbury *v.* Petty, 3 Hare 86; and see In re More's Trusts, 10 Hare 178; and a different species of case, Malcolm *v.* Taylor, 2 R. & My. 416, *ante* p. *406, n.]

3. Williamson *v.* Chamberlain, 2 Stockt. 373; Beatty's Adm'r *v.* Montgomery's Ex'r, 6 C. E. Gr. (N. J.) 324. But see Pike *v.* Stephenson, 99 Mass. 188.

(z) 3 Russ. 365. [See also Haddelsey *v.* Adams, 22 Beav. 266.]

(a) But as to which, *vide ante* p. *753.

the prior bequest being expressly for life, which distinguished the case before him from all that had been cited, including Billings *v.* Sandom; which case stands upon its special circumstances, and is only to be reconciled with subsequent authorities on the ground that the context warranted the construing the words "and in case of her demise" to mean *at* her demise.

Remarks on Smart *v.* Clark.

Where the prior gift, though not expressly for life, comprises the annual income only of the fund which is the subject of the bequest, the same construction seems to prevail as where the prior gift is expressly for life.

Where prior gift comprises the income only.

*Thus, in Tilson *v.* Jones, (*a*) where a testatrix directed the interest of certain stock and a canal share to be equally divided between her son and daughter, exclusive of any husband; *and in case of the death of either*, then the whole of the interest to the survivor; and if her son should not be in England at the time of her decease, then the execution of the trusts so far as they related to him should be postponed until his return; *but in case of his death*, then the trustees should pay the whole of such interest to her daughter; *and in case of her death*, the testatrix gave the whole of such principal and interest between her niece and nephew; and in case of their death before her son and daughter, then she gave the principal and interest at the deaths of the son and daughter to C. M. The daughter survived the son, and claimed to be absolutely entitled; but Sir J. Leach, M. R., said that the testatrix must be understood as if she had expressed herself thus: "I give the principal and interest to my niece and nephew, if they shall survive my son and daughter; and if they shall not survive them, then to C. M." She could not refer here to the death of her son and daughter in her lifetime; the daughter therefore took for life only. *Besides this, the testatrix in her gift to her son and daughter spoke of the interest only, but in the gift over she spoke of the principal and interest.*

Consistently with the principle of the two cases just stated it has been held that the words under consideration succeeding an indefinite devise of *land* would (as such a devise, if contained in a will which is subject to the old law, confers only an estate for life) be held to be synonymous with "*after* the

Words following an indefinite devise of land.

(*a*) 1 R. & My. 553.

death," and accordingly the estate to which they are prefixed is a vested remainder, expectant on such life estate. (*b*)

Thus, in Bowen *v.* Scowcroft, (*c*) where an undivided share in lands was devised to W. and B., and in case of their demise the testator devised their respective shares to be equally divided among their children or their lawful heirs, Alderson, B., was of opinion that, as this was the case of a devise of land, the authorities relating to personal estate did not apply, and that the words were to be construed "*after* their decease."

—following estate tail.

It seems that, where a testator devises an estate *tail* to a person, and "if he die," then over to another, the words "without issue" are supplied to render it consistent with that estate. (*d*) 4

(*b*) Fortescue *v.* Abbott, Pollex. 479, T. Jones 79.

(*c*) 2 Y. & C. 640. This overrules Lord Kenyon's suggestion in Goodtitle *v.* Edmonds, 7 T. R. 635.

(*d*) Anon., 1 And. 33, *ante* vol. I., p. *486.

4. See Den *v.* Combs, 3 Harr. (N. J.) 27; Liston *v.* Jenkins, 2 W. Va. 62; Butterfield *v.* Hamant, 105 Mass. 338; McKeehan *v.* Wilson, 53 Penna. St. 74.

*CHAPTER XLIX.

WORDS REFERRING TO DEATH COUPLED WITH A CONTINGENCY—TO WHAT PERIOD THEY RELATE.

I. *Death of Object of prior Gift in Testator's lifetime.—Substitution.*

II. *Death of Object of prior Gift after Testator's death* (1) *where there is a previous Life Interest,* (2) *where there is no previous Interest—Death before Legacy is* payable (Emperor *v.* Rolfe) — *Death without* leaving *Children* (Maitland *v.* Chalie.)

The distinction between the cases which form the subject of the present inquiry and those discussed in the last chapter is obvious. There it was necessary either to do violence to the testator's language by reading the words providing against the event of death as applying to the occurrence of death at any time (in which sense death is not a contingent event,) or else to give effect to the words of contingency by construing them as intended to provide against death within a given period.

Distinction between the cases discussed in the last and in the present chapter.

In the cases now to be considered, however, the expositor of the will is placed in no such dilemma; for the testator having himself associated the event of death with a collateral circumstance, full scope may be given to his expressions of contingency without seeking for any restriction in regard to time; and accordingly there seems to be no reason (unless it be found in the context of the will) why the gift over should not take effect in the event of the prior legatee's dying under the circumstances described at *any* period. Cases of this kind, however, will be found to present many distinctions which require particular attention. The cases are divisible into two classes: 1. Where the question is, whether the substituted gift takes effect in the event of the prior legatee dying under the circumstances described in the testator's lifetime. 2. Where the question is, whether the substituted gift takes effect in the event

Classification of the cases.

of the prior legatee surviving the testator, and *afterwards* dying under the circumstances described; and if so, whether at *any* time subsequently.

Death of object of prior gift in testator's lifetime.

*I. It may be stated as a general rule, that where the gift is to a designated individual, with a gift over in the event of his dying without having attained a certain age, or under any other prescribed circumstances, (a) and the event happens accordingly in the testator's lifetime, the ulterior gift takes effect immediately on the testator's decease, as a simple absolute gift. [1]

Ulterior legatees held to be entitled.

In the early case of Darrel *v.* Molesworth, (b) where a legacy of £50 was given to D. T. at twenty-one or marriage, and at the close of his will (which contained several pecuniary bequests,) the testator added, that *if any legatee died before his legacy was payable,* the same should go to the brothers or sisters of such legatee. D. T. died in the lifetime of the testator (it is presumed under twenty-one, (c) though the fact is not stated,) and it was adjudged that it was no lapsed legacy, but went to the sister of the legatee.

So, in Willing *v.* Baine, (d) where a testator bequeathed £200 apiece to his children [by name,] payable at their respective ages of twenty-one, *and if any of them died before their age of twenty-one,* then the legacy given to the person so dying to go to the surviving children. One of the children died in the testator's lifetime (a minor, it is presumed, though the fact is not stated,) and it was held that the children living at the death of the testator were entitled to his legacy.

—though gift over be of the "share" of the deceased.

[The construction is not varied] though the gift over be of the "legacy" or "share" of the deceased object—terms which might seem in strictness to apply only to persons who, by surviving the testator, had become actual objects

[(a) As to a bequest to A, with a gift over in case he dies *intestate,* see *ante* p. *15.]

1. Teed *v.* Morton, 60 N. Y. 502; Lawrence *v.* Hebbard, 1 Bradf. 252, 256; Goodall *v.* McLean, 2 Bradf. 306, 309; Wms. Ex'rs (6th Am. ed.) 1318; Stephens *v.* Milnor, 9 C. E. Gr. (N. J.) 358, 374, 375; Dunlap *v.* Dunlap, 4 Desaus. 305, 314; Mebane *v.* Womack, 2 Jones Eq. 293; May's Appeal, 41 Penna. St. 512.

(b) 2 Vern. 378. See also [Ledsom *v.* Hickman, Id. 611; Bretton *v.* Lethulier, Id. 653; but see Miller *v.* Warren, Id. 207, n., Raithby's ed.

(c) But see n. (e), *infra.*

(d) Kel. 12, 2 Eq. Cas. Ab. 545, pl. 22. The report, 3 P. W. 113, omits to state that the children were named. See, further, Benn *v.* Dixon, 16 Sim. 21; Willetts *v.* Willetts, 7 Hare 38; Ivé *v.* King, 16 Beav. 46; In re Domvile's Trust, 22 L. J., Ch. 947; Hues *v.* Jackson, 23 L. J., Ch. 51.]

of gift, in contra-distinction to those who, dying before him, could in point of fact have no "share" or "legacy" under the will.

Thus in Walker *v.* Main, (*e*) where a testator devised real estate to his wife for life, remainder to a trustee in trust for sale, and to pay the produce among his children and grandchildren *[in manner following: he then gave £20 each to several of his grandchildren *nominatim*, to be paid at twenty-one or marriage; and to his four children A, B, C, and D, all the residue to be divided amongst them equally at the age of twenty one or marriage]; *but if any of his children or grandchildren should happen to die before the time of such legacy becoming due and payable*, then he bequeathed the *part or share* of the child or children or grandchildren so dying unto and amongst those that should be then living, share and share alike. B and C died in the testator's lifetime, and it was held that their shares devolved to the survivors.

Again, in Humphreys *v.* Howes, (*f*) where a testator bequeathed the residue of his personal estate to trustees upon trust for A, B and C, for their lives, and to the survivor for life, and after their decease upon trust to transfer and pay the same to E (son of B) and F (son of C,) share and share alike; *and in case E or F should happen to die before his share of the trust-money should become payable without leaving issue of his body*, then his *share* to go to the survivor; and in case both should die before their shares should become payable without leaving issue, then over. E died in the testator's lifetime without issue. It was contended that the event intended to be provided against was the death of the legatees after the testator's decease, until which event they could not with propriety be said to have any "shares" in the property; but Sir J. Leach, M. R., held that Willing *v.* Baine was applicable, and accordingly that the ulterior bequest took effect notwithstanding the death of the legatee in the testator's lifetime.

So in Mackinnon *v.* Peach, (*g*) where a testator directed certain

(*e*) 1 J. & W. 1. [It appears that B had attained twenty-one, R. L. 1818, B. 2051. "The time of becoming payable" was therefore held not to arrive until both events had happened, viz., majority (or marriage) and the death of the testator. See also In re Gaitskell's Trust, L. R., 15 Eq. 386, and *post* § 2.]

(*f*) 1 R. & My. 639.

(*g*) 2 Kee. 555. See also Ashling *v.* Knowles, 3 Drew. 593; [In re Green's Estate, 1 Dr. & Sm. 68.] But compare these cases with Rider *v.* Wager, 2 P. W. 331, where a testator bequeathed [part of a sum due to him from A to the second son of A, and the rest of the money to the

chattels to be divided between his two daughters, share and share alike, and that *upon the demise of either of them without *lawful issue*, then the *share of her so dying* should go to her sister; it was held that one of the legatees having died unmarried in the testator's lifetime, her surviving sister was entitled to the whole.

And this construction prevailed (in spite of some apparently opposing expressions) in Rheeder *v.* Ower, (*h*) where a testator bequeathed the interest of the residue of his property to his five sisters for life, *and in case any of them should die leaving issue*, then the trustees were to pay and transfer the share *to which his sister so deceasing was entitled at or before the time of her decease to receive the interest and dividends thereon*, unto and amongst all and every such child or children of such deceased sister equally between them, share and share alike, at their respective ages of twenty-one years. One of the sisters died in the testator's lifetime leaving children, and it was objected to the claim of such children that the trust was confined to the children of those sisters who had become entitled to receive the interest; but Lord Thurlow decided in favor of their claim, observing that, in a will so loosely drawn, it was more probable that that was the testator's intent than the contrary.

[And in Varley *v.* Winn, (*i*) where a testator gave to each of his five daughters £6000, to be invested within seven years after his decease in trust for them or their children: but if any of his said daughters should die leaving no issue, then *the share or portion so invested* should be divided among those who had issue. One daughter died without issue in the testator's lifetime, and it was held that the legacy bequeathed to her passed under the gift over.]

Where, however, the gift is to a class, the objects of which are not,

other younger children of A,] the same to remain in A's hands until the children should be capable of receiving it, *and the legacy or share of any of them dying before such time* to go to the survivors and survivor of them; A's second son died in the testator's lifetime, but the other younger children survived the testator, and claimed the second son's share; but it was considered that the gift to survivors must be intended if the legatee should have survived the testator; but that where the legatee died in the lifetime of the testator, as nothing could ever vest in the legatee, so neither could it survive from him. [Lord Langdale also gave effect to a similar argument in Bastin *v.* Watts, 3 Beav. 97, and Smith *v.* Oliver, 11 Beav. 494; as to which, however, see per Kindersley, V. C., 1 Dr. & Sm. 73.]

(*h*) 3 B. C. C. 240. [See also Rackham *v.* Delamare, 2 D., J. & S. 74.

(*i*) 2 K. & J. 700.

according to the general rules of construction, ascertainable until the decease of the testator (as in the case of a gift to children generally,) the application of the words providing against the event of death to children dying in the testator's lifetime becomes rather more questionable, they not being, in event, actual objects of the gift, and therefore not within the clause in question if that clause is to be construed strictly as a clause of substitution. There are not wanting cases, however, in which even under such circumstances the words have been held to apply to death in the testator's lifetime, though the gift over, being of the share of the deceased object, *seemed to afford a plausible argument [as already noticed] in favor of the contrary construction.

Distinction where gift is to a class;

[Thus in Jones v. Frewin, (k) where a testator made a general bequest to his wife for life, and at her death to be paid and divided unto and between his nephews and nieces, children of his brother S. (then living) and his late sister E., and also unto and between the brothers and sister of his wife, in equal shares; provided that if any of his nephews or nieces, or the brothers or sister of his wife should die in the lifetime of his wife, leaving a child or children, such child or children should be entitled to a father's or mother's share. One of the wife's brothers died in the testator's lifetime (and before the wife,) leaving a daughter; and it was held by Sir W. P. Wood, V. C., that she was entitled to a share; for that, although the class of nephews and nieces was capable of increase, such increase was not intended to take away from the individuals *in esse* the benefit of the proviso in favor of their children in case they should die.

—but ulterior gift still held to operate.

"I think," said Sir W. James, V. C., speaking of an immediate gift to "cousins," (l) "a fallacy arises from applying to the construction of these instruments that rule which says that the class is to be ascertained at the death of the testator; because *prima facie* a testator must be supposed to have had in view living persons subject to the contingency of such persons living up to the time of his death. The gift is 'unto my first cousins.' That means the first cousins who shall answer both requirements. If I were to complete the will by introducing into it strictly legal language, the meaning of the clause

(k) 12 W. R. 369, 3 N. R. 415.

(l) In re Hotchkiss' Trusts, L. R., 8 Eq. 649. There were here no first cousins born between the date of the will and of the testator's death.

would be this, 'I give * * * to my first cousins who are now living and who shall continue to live up to the time of my death.'"

And in Habergham *v.* Ridehalgh, (*m*) where a testator devised real estate in trust for his brother-in-law H. and all and every the testator's brothers and sisters, in equal shares, for their lives, with benefit of survivorship where any of them died without leaving children; but where any of them died leaving children, then upon trust to let such children have their parent's share until the longest liver of testator's said brother-in-law, brothers and sisters should die; and so soon as all should be dead, in trust to convey the property unto and equally among the children of the brother-in-law, brothers and sisters, in equal shares *per *stirpes;* but if any of them died without leaving a child, then to convey the shares of such as should so die to the survivors in equal shares. H. and a brother and sister died between the date of the will and the testator's death, and the question was, whether their children were entitled to shares of the rents during the continuance of the life estate. It was held by Sir W. James, V. C., that they were. He thought he must come to the conclusion that the children of H. were objects of the testator's bounty, and it seemed to him also that the other children of the testator's brothers and sisters were also intended to be objects of his bounty.

Opinion of Romilly, M. R., *contra.*

It is proper to state that Sir J. Romilly uniformly expressed an opinion that where the original gift was to a class the gift over did not operate if the deceased object died before the testator, because such object could not himself have taken. (*n*) He never had occasion however to decide accordingly, and it is conceived that the weight of authority and opinion is against him.

Construction where possession is immediate.

If the gift to the class is immediate, and no time is specified for the vesting or for the distribution of it, a gift over in case of death before the legacy is payable is necessarily confined to the case of a child dying in the testator's lifetime. Thus, in Cort *v.* Winder, (*o*) where a testator bequeathed the residue of his estate in trust for all and every of his first cousins german, share and share alike; and in case any of his *said* cousins should die *before their respective shares should become due or payable,* leaving issue him or them surviving, the testator directed that such issue should

(*m*) L. R., 9 Eq. 395. See also Smith *v.* Smith, 8 Sim. 353, *post* p. *774.

(*n*) 16 Beav. 53, 26 Beav. 32.

(*o*) 1 Coll. 320.

have the same share or shares as his or their parent or parents would have been entitled to if living. (*p*) One of the cousins died before the testator, leaving issue, and it was held by Sir J. K. Bruce, V. C., that the words due or payable were referable to the time of the testator's death, and that the share intended for the deceased cousin belonged to his issue, "although it had been said to be difficult or apparently difficult to reconcile with that construction the sort of interpretation adopted in Viner *v.* Francis, (*q*) and other cases of that kind, which attribute this class-description to persons who represent the class at the time of the death."

Settlement of share to which daughters "should become entitled."

*To this property of a class-description, however, the decision in Stewart *v.* Jones (*r*) must, it would seem, be mainly ascribed. In that case a testator bequeathed his residuary estate in trust for all and every his children and child then born and thereafter to be born, who being sons should attain twenty-one, &c., as tenants in common; "provided always that the share in the trust-moneys to which each of his daughters on attaining twenty-one or marrying under that age *should become entitled* under the trusts aforesaid, should be held" in trust for the daughters for life and afterwards for their children. It was held by Sir W. P. Wood, V. C., and on appeal by Lord Chelmsford, that the children of a daughter who died before the testator were not entitled to a share. Stopping at the proviso, the L. C. observed that it was admitted that there could have been no share but those of children living at the testator's death; and "the proviso (he added) merely settled the shares of daughters who would take under the preceding gift. For what did the testator dispose of in this proviso? Why the shares to which his daughters should become entitled under the trusts aforesaid."

This construction was not of the kind called benignant. It was strongly disapproved of by Sir R. Malins, V. C., in In re Speakman, (*s*) where a testator gave the proceeds to arise from the sale of his real and personal estate in trust for all his children who being sons should

(*p*) No reliance appears to have been placed on the words "would have been entitled to *if living*;" any such reliance being excluded by the word "said" (cousins); as to this see Loring *v.* Thomas, 1 Dr. & Sm. 497, *post* p. *780.

(*q*) *Ante* p. *155.

(*r*) 3 De G. & J. 532. See also Wordsworth *v.* Wood, 4 My. & Cr. 641. Cf. Varley *v.* Winn, 2 K. & J. 700, and Rheeder *v.* Ower, 3 B. C. C. 240, both stated *ante* p. *764.

(*s*) 4 Ch. D. 620.

attain twenty-one or being daughters should attain that age or be married; as to the "share" of each of his daughters he directed it to be held in trust for her separate use during her life, and after her death for her children at twenty-one; if any of his daughters should die without having a child who should acquire a vested interest in their respective shares, then the share of each daughter (including accruing shares,) was to go to the testator's other children, the share of each daughter to be held on the same trusts as her original share; if any of the sons should die in the testator's lifetime leaving children, such children were to take the share which the parent would have taken if he had survived and attained twenty-one. One of the daughters died in the testator's lifetime leaving children, and it was held that they were entitled to the share which their mother, if she had *survived him, would have taken for life. "It is true (said the V. C.) that it was called her share; and it was her share for the purposes of division, and of ascertaining into how many shares the property was to be divided." He thought Stewart *v.* Jones contrary to sound principle.

—where gift is *expressly* to children living at testator's death.

If the original gift be, not to the class generally, but to such of them only as survive the testator, a contingent gift engrafted thereon in case of the death of any of them can only mean death happening after the death of the testator. Thus in Shergold *v.* Boone, (*t*) where a bequest was made to the children of S. who should be living at the time of the testator's decease; and in case any of them should die without leaving issue, his share to go to the survivors or survivor of them; but in case they should leave issue, such issue to be entitled to the share of their deceased parent. Sir W. Grant, M. R., held that the case provided for was the death of any of the children who were the objects of the former bequest, and no children who died before the testator were objects. "The bequest," he said, "is not to all the children generally, but to such only who shall be living at the testator's decease."]

Gift over in case of death to executors or administrators, or

It seems that where the objects of gift in the clause in question are the executors or administrators, or personal representatives, of the deceased legatee, such clause is considered as merely showing that the legacy is to be vested immediately on

(*t*) 13 Ves. 370. See also Crook *v.* Whitley, 7 D., M. & G. 490 (distinct legacies "to each of the present nieces of A.")]

the testator's decease notwithstanding the subsequent death of the legatee before the period of distribution or payment, and not as indicating an intention to substitute as objects of gift the representatives of those who die in the testator's lifetime.

personal representatives.

Thus, in Bone *v.* Cook, (*u*) where a testator bequeathed the residue of his estate, at the death of his wife, equally between four persons, and then provided, that in case of the death of any of the legatees before their legacies should become payable, then that the legacy of each so dying should go to his, her or their children; and *in case of such decease of any of the said legatees without having a child or children,* the legacy of him or her so dying *should go to his or her executors or administrators, as part of his, her or their personal estate.* It was held that the *share of one of the legatees who died in the testator's lifetime unmarried lapsed, though it was admitted that, if she had left a child, such child would have been entitled under the previous clause.

[And the same rule holds where there is no express contingency coupled with the event of death. Thus,] in Corbyn *v.* French, (*x*) where a testator bequeathed the residue of his estate to his wife for life, and at her decease gave (among other legacies) one to each of the children of E., *or their representatives or representative;* Sir R. P. Arden, M. R., was of opinion that by the death of one of the children in the testator's lifetime the legacy lapsed, on the ground that a testator must be supposed to contemplate that his legatees will survive him. [2]

Gift to personal representatives not substitutional.

(*u*) M'Clel. 168, 13 Pri. 332.

(*x*) 4 Ves. 418.

2. For substitutional gifts see ch. XXX., note 20. In other cases, the words heirs, executors, &c., superadded to the name of a legatee or devisee, have been held to be words of limitation merely, giving no estate by way of substitution. Thus a gift to testator's brothers and sisters "and their heirs," Smith *v.* Folwell, 1 Binn. 546; or to children "or their heirs," Patterson *v.* Hawthorn, 12 Serg. & R. 112; King *v.* King, 1 Watts & S. 205; Buckley *v.* Reed, 15 Penna. St. 83; Manderson *v.* Lukens, 23 Id. 31; McGill's Appeal, 61 Id. 46; Mull *v.* Mull, 81 Id. 393; or to A "or his legal representatives," Fleck's Estate, 1 Pars. Cas. 126; "and his heirs," Dickinson *v.* Purvis, 8 Serg. & R. 71; "his heirs and assigns," Comfort *v.* Mather, 2 Watts & S. 450; or after a life estate to A, remainder to the children of B, "or to the issue of deceased children as shall be living" at the time of A's death, Brown *v.* Williams, 5 R. I. 318.

On the other hand, there are several cases where like clauses have been held to indicate an intent to substitute the heirs or representatives, and effect has been given to them accordingly:

1st. Where the gift was to A "and his heirs," Hawn *v.* Banks, 4 Edw. 664;

Again, in Tidwell *v.* Ariel, (*y*) where a testator, after bequeathing several legacies, directed that they should be paid "in one whole year after his decease, *or to their several and respective heirs,*" Sir J. Leach, V. C., held that one of the legacies failed by the death of the legatee in the testator's lifetime, the intention being that the legacies should be paid to the representatives if they died within the year.

It is proper to remind the reader, in connection with the three last cases, that in several instances the words "representatives" and "heirs," when applied to personalty, have been held to be synonymous with *next of kin;* (*z*) but perhaps this does not much weaken the special ground to which these cases have been referred.

Unless the prior gift be immediate.

[But where the gift to the primary legatee or his representatives is immediate, without a prior life estate and without postponement of payment, a gift in the alternative to the "heirs" can only refer to the event of death in the testator's lifetime, and is held to import not simply payment to the representatives of the legatee, but substitution of his statutory next of kin. (*a*)

Gift over of interest of married woman, in case of death, to her next of kin.

It has been elsewhere noticed, that if property be given by will to one for life with remainder over, and the tenant for life dies in the lifetime of the testator, the remainder takes effect on his death as an immediate gift. But it was made a ques*tion, where the tenant for life was a married woman, and the remainder was limited to her next of kin, in the event of her dying in the lifetime of her husband,

Flournoy *v.* Flournoy, 1 Bush 526; Vaughan *v.* Dickens, 2 Dev. & Bat. Eq. 52.

2d. Where the gift was to A "or his heirs," Heyward *v.* Heyward, 7 Rich. Eq. 289; Wren *v.* Hynes, 2 Metc. (Ky.) 129; Brasher *v.* Marsh, 15 Ohio St. 103; Wright *v.* M. E. Church, Hoffm. Ch. 202; Taylor *v.* Conner, 7 Ind. 115; Robb *v.* Belt, 12 B. Mon. 645.

3d. Where the gift was to A "and his issue," Watson *v.* Woods, 3 R. I. 227.

4th. Where the gift was to A "or his representatives," Dickinson *v.* Hoomes, 1 Gratt. 302.

5th. Where the gift was to A "or to his children," O'Brien *v.* Heeney, 2 Edw. 242; Sawyer *v.* Baldwin, 20 Pick. 378.

(*y*) 3 Mad. 403. And see Tate *v.* Clarke, 1 Beav. 100; [Thompson *v.* Whitelock, 4 De G. & J. 490.]

(*z*) *Ante* pp. *79, *111. [And see In re Porter's Trust, 4 K. & J. 188 (where "heirs" was construed next of kin, and Tidwell *v.* Ariel was discussed); King *v.* Cleaveland, 26 Beav. 26, 166, 4 De G. & J. 477.

(*a*) Gittings *v.* M'Dermott, 2 My. & K. 69. See *ante* p. *116.]

whether the latter gift was not to be] viewed in the same light as a bequest to heirs or executors and administrators; namely, as being intended merely to apply to the event of the legatee dying in the lifetime of her husband, after having survived the testator, and not to prevent lapse in the event of the legatee dying under similar circumstances in the testator's lifetime.

Thus, where (*b*) a testator bequeathed to trustees £10,000, to be invested in stock, in trust for A, a married woman, during the joint lives of herself and her husband, and in case she survived him, to her absolutely; but, if she did not survive him, to such person as she should by will appoint, and in default of appointment, to her next of kin, exclusive of her husband: A died in the lifetime of her husband and of the testator; and it was held [by Sir J. Leach, V. C., and on appeal by Lord Lyndhurst,] that the legacy lapsed.

[But in Hardwick *v.* Thurston, (*c*) where a testatrix bequeathed a sum of money in trust for such person as her daughter A (who was at that time unmarried) should appoint, and in default of appointment for A for her separate use for her life; and after her death for her next of kin, according to the statute, exclusive of her husband; A having married and died in her mother's lifetime, Sir J. Leach, V. C., held that her next of kin were entitled.

And in Edwards *v.* Saloway, (*d*) where a testator gave the residue of his estate in trust for his wife for life, for her separate use, and after her death in trust for such persons as she should by deed or will appoint, and in default of appointment for her next of kin: the testator's wife died before him, and it was contended on the authority of Baker *v.* Hanbury that the next of kin took nothing under the will; but Sir J. K. Bruce, V. C., and on appeal Lord Cottenham, held otherwise. The V. C. distinguished Baker *v.* Hanbury on the ground that there Lord Lyndhurst inferred an intention that the bequest to A should be absolute, and that the words used were only to protect the absolute interest; but Lord Cottenham considered it to be inconsistent with Hardwick *v.* Thurston, which he had no hesitation *in preferring: so that Baker *v.* Hanbury must be considered as overruled.]

Where there is a devise or bequest to a class of objects who are to

(*b*) Baker *v.* Hanbury, 3 Russ. 340.

[(*c*) 4 Russ. 380.

(*d*) 2 De G. & S. 248, 2 Phil. 625; and see Nichols *v.* Haviland, 1 K. & J. 504.]

Whether children of objects dead at date of will can have the benefit of clause of substitution.

be ascertained at the testator's death, or at some period subsequent to it, with a substitution of the children of objects who should happen to be deceased at the period of distribution, and it happens that some individual of the class was dead when the will was made, it is not too readily to be concluded from the preceding authorities that the clause in question lets in the children of such predeceased person; for in several such cases it has been construed strictly as a clause of substitution, and therefore as not comprehending the children of any who could not in any possible event have been objects of the original gift. 3

Christopherson v. Naylor.

Thus, in Christopherson *v.* Naylor, (*e*) where a testator bequeathed to "each and every of the child and children of my brother and sisters A, B, C and D, which shall be living at the time of my decease, except my nephew F." (for whom he had already provided); "*but if any child or children of my said brother and sisters, or any of them,* (besides the said F. my nephew,) *shall happen to die in my lifetime" and leave issue at his or their decease,*

Children of objects dead at date of will excluded.

"then and in such case the legacy or legacies hereby intended for such child or children so dying shall be upon trust for, and I give and bequeath the same to, his, her or their issue, such issue taking only the legacy or legacies which his, her or their parents or parent would have been entitled to if living at my decease." It was contended that the expression "*shall* die in my lifetime," though literally applicable only to *future* death, might be held to embrace the children who were dead at the time of making the will, by analogy to those cases in which a gift to children "*to be* begotten" had been held to include children previously born; (*f*) but Sir W. Grant, M. R., observed that the question did not depend upon these words, which, though according to strict construction importing futurity, might have been understood as speaking of the event at whatever time it might happen. (*g*) "The nephews and nieces," he

3. But in Lawrence *v.* Hebbard, 1 Bradf. 252, it was held that the children of a child deceased prior to the execution of the will were entitled to be substituted for their parent. In this case, at page 258, it was said by Bradford, Surrogate: "The testator did not contemplate only future deaths; but in connection with a future period of distribution, an ascertainment at that time of those who might then be dead, and a consequent provision for their issue if any." See also Long *v.* Labor, 8 Penna. St. 229.

(*e*) 1 Mer. 320.

(*f*) *Ante* p. *181.

[(*g*) See also Hannam *v.* Sims, 2 De G.

said, "are here the primary legatees; nothing whatever is given to their issue, except in the way of substitution. In order to claim, therefore, under the will, these substituted *legatees must point out the original legatees in whose place they demand to stand. But, of the nephews and nieces of the testator, none could have taken besides those who were living at the date of the will. The issue of those who were dead at that time can consequently show no object of substitution; and to give them original legacies would be, in effect, to make a new will for the testator."

So, in Butler *v.* Ommaney, (*h*) where a testator bequeathed the residue of his estate after the death of his wife and brother Joseph, to be equally divided between the children of his said brother and his late sister Betty and late brother Jacob, who should be then living, in equal shares; *and as to such of them as should be then dead*, leaving a child or children, such child or children were to be and stand in the place or places of his, her or their parent or parents; Sir L. Shadwell, V. C., held that the children of such children of the testator's brother Jacob who died in the testator's lifetime (*and who were also dead at the date of the will*) were not entitled to any share of the residue.[4]

So, in Peel *v.* Catlow, (*i*) where a testator bequeathed one-sixth of his residuary estate to the children of his late sister Jane equally, and in case any such child or children should die under twenty-one leaving issue, their shares to be paid to such issue; and if any such child or children should die under twenty-one and leave no issue, then the share of him or her so dying to go to the survivors and the issue of such of the deceased children as should have died so leaving issue as aforesaid (such issue to take no greater share than his, her or their parent or respective parents would have been entitled to if living); and as to one other sixth, in trust for the testator's sister Mary C. for life, and after her decease, in trust for her *issue*, to be payable at the like times and with the like benefit of survivorship and in like manner as was thereinbefore expressed concerning the sixth part thereinbefore given to the children of the testator's sister Jane; and in case the testator's sister Mary should depart this life without leaving issue of her body, or leaving any they should die under twenty-one and

A J. 151; Loring *v.* Thomas, 1 Dr. & Sm. 497; In re Chapman's Will, 32 Beav. 382; In re Woolrich, 11 Ch. D. 667.]

(*h*) 4 Russ. 73.

4. So, too, in Hatcher *v.* Robertson, 4 Strobh. Eq. 179.

(*i*) 9 Sim. 372.

should leave no issue, then over. A child of Mary C. was dead at the date of the will, (*k*) leaving a child; and Sir L. Shadwell, V. C., held that this grandchild of Mary C. was not entitled; for that, under the trusts declared of *the share of the testator's sister Jane (to which reference was here made,) no grandchild could take except by way of substitution for its parent, and as the grandchild's mother never could have become entitled to take, her claim could not be sustained.

So, in Gray *v.* Garman, (*l*) where the testator gave the residue of his real and personal estate to his wife E for life, and at her decease to be equally divided between the brothers and sisters of his wife E; and in case any or either of them should be dead at the time of the decease of E, leaving issue, then such issue to stand in the place of their respective parent or parents. The question was, whether the issue of a brother of E, who was dead at the date of the will, were entitled. Sir J. Wigram, V. C., after a full examination of the cases, held that they were not; considering that the word "them" in the second clause referred to the brothers and sisters described in the first, which clearly did not extend to a brother or sister previously dead. (*m*)

Suggested distinction where decease is after will.

It will be observed, that, in the four preceding cases, the person whose children it was attempted to bring within the compass of the clause in question was dead at the date of the will, and could not possibly have been an object of the primary bequest; and it does not follow that the same construction would have obtained, if such person had been then living, and had *subsequently* died in the testator's lifetime. There is, however, not wanting a case even of this kind. Thus, in Thornhill *v.* Thornhill, (*n*) where a testator directed that a certain estate, which by his mar-

(*k*) It does not appear whether the deceased child had attained majority.

(*l*) 2 Hare 268. [See also Smith *v.* Pepper, 27 Beav. 86; In re Ann Wood's Will, 31 Beav. 323; In re Hotchkiss' Trusts, L. R., 8 Eq. 643; Habergham *v.* Ridehalgh, L. R., 9 Eq. 395 (share of Silvanus); Hunter *v.* Cheshire, L. R., 8 Ch. 751; West *v.* Orr, 8 Ch. D. 60; In re Riddell, W. N. 1880, p. 94. These cases show that Christopherson *v.* Naylor is a binding authority, notwithstanding the disapproval of Malins, V. C., L. R., 8 Eq. 57, 14 Eq. 250, and of Stuart, V. C., 10 Jur. (N. S.) 231, 1174, and notwithstanding the apparently contrary decision of Jessel, M. R., in In re Smith's Trusts, 5 Ch. D. 497.]

(*m*) It was also held that the children of such of the brothers and sisters of E. as survived the testator, and afterwards died in the lifetime of E., were entitled; as to which, indeed, there could be no doubt.

(*n*) 4 Mad. 377. Whether the nephews and nieces were in existence at the date of the will is not stated.

riage settlement he had settled on his wife for life, and another estate, which he had devised to her for her life, should be sold at her decease, and the money arising therefrom equally divided among his nephews and nieces, *the children of such of them as should be then dead standing in the place of their father and mother deceased.* The question was, whether the children of such of the nephews and nieces as died in the testator's lifetime were entitled. Sir J. Leach, V. C., decided in *the negative; being of opinion, that the latter clause applied to the children of such of the nephews and nieces only as died after the testator, and before the wife.

Thornhill v. Thornhill overruled.

The case of Thornhill *v.* Thornhill, however, has been much disapproved of, as applying a very harsh and rigid rule of construction to testamentary provisions for children; and its authority was unequivocally denied in Smith *v.* Smith, (*o*) where a testator gave his residuary estate to trustees, in trust for his wife for life, and after her death to divide it amongst all his children who might be *then* living: the shares of such of them as should then have attained twenty-one to be paid to them within three months after his wife's death, and the shares of others on their attaining twenty-one, or to the survivors of them in case of the death of any of them in his wife's lifetime and without leaving issue. *Provided that if any of his children who should die in his wife's lifetime should have left issue,* such issue should have such share or shares as his, her or their parent or parents would have been entitled to if living. The testator's wife survived him. One of his children who was living at the date of his will died in his lifetime, leaving issue who survived

(*o*) 8 Sim. 353. Thornhill *v.* Thornhill is said to have been overruled by Pepys, M. R., in the previous case of Collins *v.* Johnson, 8 Sim. 356, n.; but as the bequest in that case was to the nephews and nieces *nominatim*, and not as a class, its authority on the point is much less conclusive than Smith *v.* Smith, stated in the text. The writer, however, distrusts his own impressions on this point; as, since the preceding remark was written, he finds the case referred to by Sir L. Shadwell, 9 Sim. 550, as one which presented much greater difficulty than the case then before the court (Jarvis *v.* Pond, *post p.* *777); though on what ground his Honor arrived at this conclusion does not appear. [In Olney *v.* Bates, 3 Drew. 319, the point did not arise; for though the child, whose issue claimed, (and failed in their claim,) survived the making of the will, yet as she also survived the widow, (who predeceased the testator,) the event on which the substitutionary gift was expressly limited did not happen. The case was also influenced by a codicil, whereby the testator had himself put an interpretation on the substitutionary clause. Note, however, that Smith *v.* Smith was classed by Romilly, M. R., as an original gift to the issue, 26 Beav. 31; and see Loring *v.* Thomas, 1 Dr. & Sm. 497, *post* p. *780.]

the testator and his widow; and it was held that such issue were entitled to a share of the residue.[5] Sir L. Shadwell, V. C., said, "I think that the decision in Thornhill *v.* Thornhill, is wrong."

Distinction where children of deceased claim under original gift.

Where, however, the children of the deceased person found their claim not on a mere clause of substitution, but on a substantive, independent, original gift, comprehending them concurrently with another class of objects, the doctrine of the preceding cases does not apply, and the gift will extend to the children of persons who were dead when the will was made.[6]

Children of deceased objects allowed to participate.

*Thus, in Tytherleigh *v.* Harbin, (*p*) where a testator devised a certain estate to trustees in trust for R. T. for life, and after his decease in trust to convey the same "unto or amongst all and every and such one or more of the child or children of the said R. T. who shall be living at the time of his decease, *and the issue of such of them as shall be then dead leaving issue*, such issue to take equally between them the share only which their parent would have been entitled to if then living." The question was, whether the issue of a child of R. T., who was dead at the date of the will, were included in the devise. It was contended, on the authority of Christopherson *v.* Naylor, Thornhill *v.* Thornhill, and Waugh *v.* Waugh, (*q*) that they were not entitled; but Sir L. Shadwell, V. C., decided that the gift included these objects. "In this case," he said, "there is an original substantive gift to the child or children of R. T. living at the time of his decease, and the issue of such of them as should be then dead leaving issue; and I think that the word 'them' means nothing more than 'child or children.' This case, therefore, differs from the first three cases cited for the plaintiffs. The testator then says: 'Such issue to take, between or amongst them, the share only which their parent or parents would have been entitled to, if then living.' These words were necessary, in order to show what share the issue of a deceased child were to take amongst them; for, if there had been two surviving children, and ten children of a deceased child, and those words had not been used, there might

5. See Whitehead *v.* Lassiter, 4 Jones Eq. 79.

6. Wheeler *v.* Allen, 54 Me. 232, 239.

(*p*) 6 Sim. 329.

[(*q*) 2 My. & K. 41. This case, however, though professedly decided on the same principle as Christopherson *v.* Naylor, must be considered as overruled by the cases now under consideration. See 1 Dr. & Sm. 521.]

have been a question whether each of the ten grandchildren was not entitled to an equal share with the two surviving children."

So, in Clay *v.* Pennington, (*r*) where a testator in a certain event bequeathed a residuary fund unto the children of his brother B *and their lawful issue*, in equal shares and proportions, or unto such of them as should prove their right, to the satisfaction of the trustees, within two years after notice thereof, to be inserted in the London Gazette. Some of the children of B were dead at the date of the will; and it was held that the issue of such children were entitled to participate with the other children and their issue, it being considered that the gift included all the descendants of the brother, without distinction, who were living at the period in question.

Children of deceased objects let in.

*Again, in Rust *v.* Baker, (*s*) where a testator gave one-fifth part of his residuary personal estate to A, B and C, and all and every other the children of D, and *the issue of such of his children as should have departed this life.* Long before the date of the will, D had had a child, who went abroad, and had not been heard of for twenty years. It was held that he must be presumed to have been dead at the date of the will; but nevertheless that his children were entitled under the bequest.

So, in Bebb *v.* Beckwith, (*t*) where the trust was for all and every the children of J. B., deceased, to be divided equally amongst them and the *issue of such of them as should be deceased share and share alike, such issue to be entitled to the share of his, her or their deceased parents* equally amongst them; Lord Langdale, M. R., held that the bequest included a grandchild of J. B., whose parent was dead when the will was made; considering that the effect of the latter words was merely to limit the amount of the share to which the issue was entitled, not to show that they were to take only by way of substitution.

Disinclination of court to exclude children of deceased.

And even where there is no original and independent gift to the issue, but their claim is founded on a clause apparently of mere substitution, the court anxiously lays hold of slight expressions as a ground for avoiding a construction, which in all probability defeats the actual intention, by excluding the issue of a deceased child from participation in a general family provision.

(*r*) 7 Sim. 370.
(*s*) 8 Sim. 443.
(*t*) 2 Beav. 308. [See also Gaskell *v.* Holmes, 3 Hare 438; Coulthurst *v.* Car-

Thus, in Giles *v.* Giles, (*u*) where a testator bequeathed the general residue to trustees, in trust for all his children living at the decease of his wife (to whom a life interest had been given) as tenants in common; and *if any such children or child should be deceased before his wife, and should leave issue,* then the children of such his son or daughter should be entitled to the portion of such his son or daughter who might be deceased before the decease of his wife, upon their attaining the age of twenty-one years; with a proviso, that, until the portions thereby provided for any of the said children of his said *sons or daughters* who might have died before their mother should become vested, it should be lawful for his trustees to apply the interest of the portion to which any such child might be entitled in expectancy for the maintenance of such child. The testator at the date of *his will had four sons and one daughter, and he had had another daughter, who was then dead, leaving children who survived the testator.

Children of deceased objects let in.

The question was, whether these children were objects of the bequest; and Sir L. Shadwell, V. C., decided that they were, considering that the special language of the will authorized this conclusion, without infringing the authority of the general cases before stated, which had been pressed upon him. He relied particularly on the expression "sons and *daughters,*" which he considered to indicate that the testator had the issue of the deceased daughter in his view, he having but one daughter living at the date of the will; the learned judge deeming it more probable that the plural word was used in remembrance of the child that had been born and died, than in anticipation of a future child to be born, and be a daughter.

So, in Jarvis *v.* Pond, (*x*) where the testatrix bequeathed the residue of her property to her daughter M. during her life, and after her decease to be divided among such of the testatrix's sons and daughters as should be living at the time of the decease of M.; *and in case of the decease of any of the testatrix's said sons and daughters, the surviving children of any of her sons and daughters to have their father's or mother's part,* to be equally divided among them. At the date of the will a daughter (B.) and two sons of the testatrix were dead, B. and one of the sons leaving issue; and there was only one daughter besides M. living. The testatrix gave legacies to the surviving hus-

ter, 15 Beav. 421; Etches *v.* Etches, 3 Drew. 447.]

(*u*) 8 Sim. 360.

(*x*) 9 Sim. 549.

band and widow of two of her deceased children, but not to the children of those who left issue. Sir L. Shadwell held that they were entitled to participate in the residue. The words "in case of the decease" meant only this:—"In case any child or children shall be then alive who are the issue of any of my children who are then dead;" though he admitted that there was some violence in assigning a share to the father or mother, when they never would have taken any.

"To my brothers and sisters or their issue," testator having no brother living.

[So in Gowling *v.* Thompson (*y*) where a testator, having two sisters but no brother living at the date of the will, gave his residuary real and personal estate to all and every "his brothers and sisters or their issue" in equal shares "and to their respective heirs, executors," &c., it was held by Wood and Selwyn, L. JJ., *that the issue of three brothers and of a sister, who had died before the date of the will, were entitled to share; for that if a testator spoke of his brothers and sisters at a time when he must be taken to have known (*z*) that all his brothers and one of his sisters were dead, the only rational inference was that he named the brothers and sisters for the purpose of showing how the property was to be divided.

"To *all and every* the children of my uncle R. or their issue," R. being long dead leaving only two children surviving.

The anxiety of the court that all who are possessed of equal family claims should be included, was strongly manifested in In re Sibley's Trusts, (*a*) where a testator gave the residue of his personal estate in trust for all and every the children of his uncle R. or their issue in equal shares; and devised all his real estate in trust for A. for life, and after her death to sell the same and hold the proceeds upon trust for all and every the children of the said R. or their issue in equal shares *per capita*. At the date of the will the facts, as known to the testator, were these. R. had long been dead: he had had six children, two only of whom were living; four were dead, each leaving issue. It was held by Sir G. Jessel, M. R., that these issue were entitled to participate in the proceeds of the real estate. He relied on the words "*all and every* the children," twice used, as indicating more than two (the two known to be living,) and on the improbability of

[(*y*) L. R., 11 Eq. 366, n. See also In re Jordan's Trusts, 2 N. R. 57; Barnaby *v.* Tassell, L. R., 11 Eq. 363.

(*z*) The testator's knowledge of these circumstances can seldom be assumed beyond those affecting his own immediate family, 7 D., M. & G. 496, 8 Ch. D. 63, 5 Ch. D. 501.

(*a*) 5 Ch. D. 494.

an intention to prefer the issue of the two to the issue of the four, the relationship of all six to the testator being the same and furnishing the common and only apparent motive for the gift.

To a class living at a stated time or their issue.

Again a gift is not unfrequently made to such of a class as shall be living at a stated time "*or their* issue." This is in form substitution; but, taken literally, substitution in the place of the same persons as will themselves take; which is contradictory and would be inoperative. It is therefore construed as introducing the issue of such of the class as at the time stated shall be dead; and this, of course, by way of addition and not of substitution; thus assimilating the case to Tytherleigh *v.* Harbin, and admitting issue of persons dead at the date of the will. (*b*)

Distinction where gift is to such as are living at one time or the issue of such as are living at another.

*But if the gift be to such of a class as are living at one time *or* the issue of such as shall die before another time, the latter words may by possibility have some operation by way of substitution, and will, it seems, be construed in that their natural sense. Thus in West *v.* Orr (*c*) where a testator gave the residue of his estate to his wife for life, and after her death to be divided equally amongst such of the children of his late sisters A and B as should survive his wife and attain twenty-one: "but in case any of such children shall be dead at my decease leaving issue then such issue shall take the share of their deceased parent." A daughter of A had died before the date of the will, leaving issue who claimed a share, arguing that "such" could not mean children of the sisters who should survive, but merely meant children of the sisters, and that the gift was to the children who should survive the sisters, and the issue of children who should be dead at the testator's decease. But it was held by Sir J. Bacon, V. C., and on appeal by the L. JJ., that the claim could not be maintained. The V. C. said, "One must first ascertain the class referred to, and that class I find to be—children of

West *v.* Orr.

(*b*) In re Philps' Will, L. R., 7 Eq. 151; Burt *v.* Hellyar, L. R., 14 Eq. 160; Wingfield *v.* Wingfield, 9 Ch. D. 658; Penston *v.* Penston, W. N. 1880, p. 113. And see cases where the death was after the will, King *v.* Cleaveland, 26 Beav. 26, 4 De G. & J. 477; Shand *v.* Kidd, 19 Beav. 310; Attwood *v.* Alford, L. R., 2 Eq. 479. In Congreve *v.* Palmer, 16 Beav. 435, the gift was, after the death of A, "to her sisters or their children living at her decease;" and children of a sister dead at the date of the will were excluded: it was probably considered that the sole antecedent to "their" was "children" unaffected, or not yet affected, by the *subsequent* words "living at her decease."

(*c*) 8 Ch. D. 60. See also Miller *v.* Chapman, 24 L. J., Ch. 409.

the testator's two sisters who should survive his widow and attain twenty-one. The testator says, 'in case any of such children'—still referring back to the children whom he had before defined—shall be dead at his decease leaving issue, such issue shall take. As I cannot find in this will any share or interest which would have been taken by the parent of this infant plaintiff, I cannot find that the plaintiff is entitled to any share at all under the will."

According to this construction of the words "such children," it is obvious that issue could never take by way of substitution unless the testator's wife (to whom he gave a life interest) died in his lifetime; and then only in the event of a child dying in the interval between her death and his. Perhaps it was to widen the extremely narrow scope thus given for the operation of the clause that Sir W. James, L. J., propounded another view. He said, "If the words had been 'among such of the children of my late sisters as shall survive me, but if any of such children shall be dead at my decease leaving lawful issue,' then possibly it might have been considered that we could have said that this was not a substitutional class (*qu.* clause.) But here the words *seem to me to prevent that. * * * And seeing that ordinarily speaking the gift to a class is a gift to a class of persons living, it appears to me, putting the two sentences together, that the plain grammatical construction of the will is this—'equally amongst such of the children now living of my late sisters A and B as shall survive my said wife, but in case any of such children'—that is any of the children now living (*d*)—'shall be dead at my decease leaving lawful issue, then I direct that such issue shall take the share of their deceased parent.' He is dealing with the class who are living at the date of his will, but who might possibly die between the date of his will and of his own death, and then the whole gift taken grammatically is consistent." This construction would still (as the L. J. observed) exclude issue of children dying between the testator's death and the death of his wife, if (as happened) she survived him. Either construction defeated the plaintiff's claim; and considering that by interpolating the words "now living," and using them as the sole antecedent to the word "such," to the exclusion of the very words of

(*d*) If this interpolation is right here, ought it not also to be made in the hypothetical case put by the L. J., "Such of the children of my late sisters as shall survive me"? Compare the same learned judge's view of the grammatical effect of "such" in Heaseman *v.* Pearse, L. R., 7 Ch. 285.

the will "as shall survive my wife," the grammatical meaning of the will was essentially changed, the V. C.'s construction will perhaps be preferred.

Issue to take what their parent would have been entitled to if living.

The leading authority on another frequent form of gift is Loring *v.* Thomas, (*e*) where a testatrix devised real estate in trust (after successive life estates) to sell, and to pay and divide one-fourth of the proceeds equally between all and every the children of her late aunt D., and the other shares between the children of her late aunts E. and M. and her uncle F.; provided that if "any child or children of the said" D., E., M. and F. "shall die in my lifetime" leaving children who should survive her and attain twenty-one, then "the child or children of each such child so dying in my lifetime shall represent and stand in the place of his, her or their deceased parent or respective parents, and shall be entitled to the same share or shares which his, her or their deceased parent or parents would have been entitled to if living at my decease." Some of the children of the aunts and uncle had died before the date of the will leaving children who survived the testatrix and attained twenty-one. It was *held by Sir R. Kindersley, V. C., that these children of pre-deceased children were entitled to shares. He observed that the words were not "if any of the *said* children," or "any *such* child," but generally "any child or children," and ("shall die" being, on the authority of Christopherson *v.* Naylor, construed "shall have died") the pre-deceased children of an aunt answered the hypothetical description of children who *would have been entitled* if living at the testatrix's decease as literally as children who died between the date of the will and the testatrix's death. 7

Distinction where the gift is to children or the issue of the *said* children.

But it seems that (as hinted by Sir R. Kindersley) this construction is not admissible if the words are "if any of the *said* children shall die." The additional word was in In re Thompson's Trusts (*f*) held to confine the word "children," to which it was annexed, strictly to such children as were before designated as legatees, and, therefore, to exclude the issue of such as were dead at the date of the will; although the gift

(*e*) 1 Dr. & Sm. 497. See also In re Chapman's Will, 32 Beav. 382; Adams *v.* Adams, L. R., 14 Eq. 246; In re Woolrich, 11 Ch. D. 663.]

7. See Ballard *v.* Ballard, 18 Pick. 41; Morse *v.* Mason, 11 Allen 36.

[(*f*) 2 W. R. 218, 5 D., M. & G. 280 (see 2 De G. & J. 157); and see per Wood, V. C., In re Jordan's Trusts, 2 N. R. 58. The distinction was rejected by Malins, V. C., In re Potter's Trust, L. R., 8 Eq. 52, but *qu.*

to issue was not even in form substitutionary, but "to my children then (*i. e.*, at the expiration of a previous interest) living, and the child or children of such of my *said* children as shall then be dead," the grandchildren to take such shares as their parents would have been entitled to in case they had been then living. Sir W. Wood, V. C., thought that "said" could not be explained like "their" or "them" in Tytherleigh *v.* Harbin and Gaskill *v.* Holmes, and he could not strike it out.

And in In re Riddell, (*g*) where a testator after his wife's death bequeathed "to the brothers of my said wife or the children *of the same* if they be dead when this portion of my will comes into force, they only taking the share which would have been their parent's portion had they been living at the decease of my wife;" it was held by the L. JJ., that the case was within Christopherson *v.* Naylor, and that the children of a brother who was dead at the date of the will were not entitled to participate.

In a case where the gift was to "my brothers and sisters or their heirs," it was held by Sir C. Hall, V. C., that the "heirs" *of a brother who was dead before the testatrix was born were not included. (*h*)

Brother dead before testator's birth.

And it has been suggested that the gift to issue in this form (*i. e.*, to a class living at a particular time or their issue) may be intended to take effect only in case all the parents are dead at the time referred to: (*i*) a view which the court would probably be slow to adopt.

The rule which excludes from a substitutionary gift children of objects dead at the date of the will, does not apply where the original gift is not to a *class*, but to designated individuals. The distinction is clear: the latter case comes within the principle of Darrel *v.* Molesworth; for there can be no difference between the case of a gift to a person known by the testator to be alive, and in the event of his death to his children, and a gift to a person whom the testator may suppose or believe to be living, but who is in fact dead, with a gift over to his

Children of *persona designata* dead at date of will entitled under clause of substitution.

(*g*) W. N. 1880, p. 94. But see the restrictive effect of the word "such" in a similar position got rid of, to suit "the general scheme" of a specially-worded will, Heasman *v.* Pearse, L. R., 7 Ch. 275, 285.

(*h*) Wingfield *v.* Wingfield, 9 Ch. D. 658, 666.

(*i*) Per Romilly, M. R., Attwood *v.* Alford, L. R., 2 Eq. 479.

children in case of his death. (*l*) But where the gift is to a class, the testator is always supposed to include only living objects, unless a different intention appears by the will. (*m*)

Distinction when primary gift is to such as are living at the date of the will.

Where, however, the bequest to the primary legatees, though not a class-gift, is expressly limited to those living at the date of the will, a merely substitutionary clause cannot operate in favor of the children of any then dead.] (*n*)

General conclusion from preceding cases.

These cases, it is conceived, fully warrant the position that, in the absence of an explanatory context, a gift over, to take effect in the event of the prior devisee or legatee dying under certain circumstances, applies to the event happening in the lifetime of the testator; the prevention of lapse being, it is considered, one of the purposes of such substituted gift. 8

Whether gift over takes effect on happening of event subsequent to death of testator.

II.—1. We now proceed to examine the second class of cases before referred to, namely, those in which the question has been —whether the substituted gift takes effect in the event of the prior legatee dying *subsequently to the testator's decease*, under *the circumstances prescribed; and if so, then, whether at any time subsequently.

[The general rule is] that where the context is silent, the words referring to the death of the prior legatee, in connection with some collateral event, apply to the contingency happening as well *after* as before the death of the testator. (*o*)

Allen *v.* Farthing.

Thus, in Allen *v.* Farthing, (*p*) where a testator, after directing that a sum of £200, recently paid to his daughter, should be deducted from the amount of any moneys, or any share of his personal estate, thereinafter bequeathed to her, or to which she

(*l*) Iye *v.* King, 16 Beav. 46; Hannam *v.* Sims, 2 De G. & J. 151; In re Sheppard's Trust, 1 K. & J. 269.

(*m*) Parker *v.* Tootal, 11 H. L. Cas. 164, 166.

(*n*) See Crook *v.* Whitley, 26 L. J., Ch. 350; the report in 7 D., M. & G. 490, omits this point, except in the marginal note.]

8. As a general rule, a clause of substitution is to be referred to the death of the testator, Goodall *v.* McLean, 2 Bradf. 306, 309.

[(*o*) Mr. Jarman thought it hazardous to lay down this as a general rule. But subsequent authorities, it is conceived, have established it.]

(*p*) M. S., 12th Nov., 1816. This case and the decree thereon are stated 2 Mad. 310, but without the arguments and judgment, which are necessary to elucidate the principle of the decision; the author has, however, been favored with a note of them by a friend.

should be entitled under and by virtue of that his will, proceeded to devise all his real estate to trustees upon trust for sale, and to apply the moneys to arise therefrom upon the trusts thereinafter declared concerning his personal estate. The testator then bequeathed his personalty to the same persons, upon trust to get in and recover the same, and to pay and divide the same moneys, estate and effects unto and between his son *John Allen* and his daughter *Ann Smith*, in equal moieties, share and share alike, the share of the daughter to be for her separate use; *and, in case of the death of either of them, the said John Allen and Ann Smith leaving any child or children him or her surviving*, upon trust that the said trustees should stand possessed of the said moiety of the said estate so given to him or her the said *J. Allen* and *A. Smith* as aforesaid, in trust for such child or children, as and when they should attain twenty-one, and in the meantime to apply the income for maintenance; and in case of the *death of either of them the said John Allen and Ann Smith leaving no issue lawfully begotten*, then upon trust, as to the moiety of him or her so dying, for the survivor of them. The son and daughter having survived the testator claimed absolute interests in the residue, contending that the several gifts in favor of the children and the survivor respectively were intended to provide only for the event of the legatee's dying in the testator's lifetime; and that the terms in which the testator had directed the £200 to be deducted out of his daughter's share aided this construction. Sir J. Leach, V. C., however, held that the testator's children took life interests only. He observed *that where a testator refers to death simply, the words are necessarily held to mean death in his (the testator's) lifetime, the language expressing a contingency, and death generally being not a contingent event (though even then slight circumstances would vary the construction); but in the present instance it was not necessary to resort to such a construction, the event described being not death simply, but death *leaving children*, so that there was a clear contingency expressed, and nothing to prevent the words from having full scope. Although the trustees were directed to "pay" and "divide" the property between the son and daughter, yet these words were to be taken in connection with the subsequent limitations, which cut down and qualified them; (*p*) and his Honor thought that the

The event of death, leaving children, held to apply to period after testator's death.

[(*p*) See also Bowers *v.* Bowers, L. R., 7 D., M. & G. 248.]
5 Ch. 244, 251. But cf. Ware *v.* Watson,

argument founded on the manner in which the advance of £200 was directed to be deducted out of the daughter's share was too weak and inconclusive to control the words.

So, in Child *v.* Giblett, (*q*) where a testator bequeathed the residue of his estate to trustees, upon trust, after payment of his debts, to divide the same between his two daughters, A and B, share and share alike, to whom he bequeathed the same; and in case of the death of either, the testator gave the whole to the survivor, *and in the event of their marrying and having children*, then to the child or children of them, or the survivor of them, if they should attain the age of twenty-one years, but if not, then among the children of C, share and share alike; and if only one child, then the whole thereof to that one child. A and B both survived the testator; and the question was, whether they were entitled to the property absolutely, or for life only. Sir J. Leach, M. R., held that they took life interests only. "The rule is," he said, "that where there is a bequest to two persons, and, in case of the death of one of them, to the survivor, the words 'in case of the death' are to be restricted to the life of the testator: but the question is, whether the first expression used by this testator, to which this rule would apply, is not qualified by the subsequent words of the will. The testator cannot possibly have intended that the children of C should take in the event of a marriage of his daughters, and their death without children in his lifetime, and that they should not take in the event of a marriage of his daughters, and their dying *without children after his decease. That would not be a rational distinction. I am of opinion, therefore, that the general rule is here qualified by the subsequent words used by the testator, and that in the event of A dying without children, or if she should have children and none of them live to attain the age of twenty-one, the children of C will be entitled to the residuary property of the testator."

Gift over, on A marrying and having children, extended to event *after* death of testator.

[And in Smith *v.* Stewart, (*r*) where a testator devised and bequeathed the residue of his real and personal estate in different shares amongst several persons, and directed that the whole of the said legatees should have the benefit of survivorship between them in the event of any

(*q*) 3 My. & K. 71.

[(*r*) 4 De G. & S. 252. See also Gawler *v.* Cadby, Jac. 346; Gosling *v.* Townshend, 17 Beav. 245, affirmed on distinct grounds, 2 W. R. 23; Johnston *v.* Antrobus, 21 Beav. 556 (as to the pecuniary legacy); Randfield *v.* Randfield, 8 H. L. Cas. 225, 236 (real estate); Bowers *v.* Bowers, L. R., 5 Ch. 244.]

one or more of them dying without leaving issue: the question was, whether the legatees acquired an indefeasible interest by surviving the testator; and Sir J. K. Bruce, V. C., decided that they did not.]

Gifts over comprising every possible event, confined to testator's lifetime.

Sometimes, however, it happens that a devise in fee simple is followed by alternative limitations over which collectively provide for the event of the death of the devisee under all possible circumstances. In such a case, the words of contingency are read as applying exclusively to the happening of the event in the testator's lifetime, in order to avoid repugnancy, inasmuch as the alternative limitations, if not so qualified and restricted in construction, would reduce the prior devise in fee to an estate for life. Thus, in Clayton *v.* Lowe, (*s*) where a testator gave his residuary real and personal estate to be equally divided between his three grandchildren, A, B and C, share and share alike, *forever; and if either of them should happen to die without child or children lawfully begotten*, then he directed that such part or share of the one so dying should be equally divided amongst the surviving brothers or sister; *but if any of his grandchildren should die and leave child or children lawfully begotten*, that such child or children should have their parent's share equally divided amongst them, share and share alike. All the grandchildren survived the testator, and on a case from chancery it was held in K. B. that in the events which had happened they took estates in fee simple as tenants in common.

Remarks on Clayton *v.* Lowe.

The reasons for this conclusion do not appear, but we may presume them to be in consistency with the argument (already *noticed) which was strongly urged by the very able counsel for the plaintiffs, namely, that the several alternative limitations would, unless confined to the happening of the event in the testator's lifetime, operate to cut down the fee previously devised to an estate for life; (*t*) [and on this ground the case was followed with express approbation of the doctrine contained in it, in Gee *v.* Mayor of Manchester, (*u*) where a testator gave his freehold, leasehold and personal property among his children in manner following: to his son A one-seventh share of his

Clayton *v.* Lowe confirmed.

(*s*) 5 B. & Ald. 636.

(*t*) However the devise in Clayton *v.* Lowe, of the shares of grandchildren who should die without children, would not apply to, and would therefore leave the fee in, the last survivor, who might die without children; and this makes a solid difference between such a devise and a mere estate for life; [L. R., 5 Ch. 250.

(*u*) 17 Q. B. 737. K. Bruce, V. C., expressed a different opinion upon the same case, 19 L. J., Ch. 151, 14 Jur. 825.

property, to *his heirs, executors and administrators.* And he gave one-seventh share to each of his other six children in similar terms; and provided, that in case any of his sons or daughters died without issue, that their share returned to his sons and daughters equally; and in case any of his sons and daughters died and leaving issue, that they should take their deceased parent's share. On a case from chancery it was held in Q. B. that each child who survived the testator took an indefeasible estate in fee in the real estate and an absolute interest in the leaseholds.

So, in Woodburne *v.* Woodburne, (*x*) where a testator gave all his real and personal estate upon trust for his brothers and sisters, (naming them,) their heirs, executors, administrators and assigns; and declared that if any of his said brothers and sisters should die without leaving issue, his or her share should go to the survivors, and that if any of his brothers and sisters should have left issue, such issue should be entitled to their parent's share: it was held by Sir J. Stuart, V. C., that the brothers and sisters, having survived the testator, were absolutely entitled to the estate.]

Distinction where prior gift may be regarded as a mere life interest.

Where, however, the gift, which precedes the alternative gifts over, is not (as in the preceding cases) absolute and unqualified, but is so framed as to admit of its being, without inconsistency or violence, restricted to a life interest, the ground for the construction adopted in these cases failing, the gift in question is held to confer a life interest only, there being no reason why the fullest scope should not be given to the several alternative gifts over.

*As where (*y*) a testatrix bequeathed to A the sum of £400, to be vested in the public funds, the interest whereof she should receive when she attained twenty-one. *In the event of her decease at, before or after the said period,* the sum so bequeathed to be divided between B and C. Lord Langdale, M. R., said that the words "at, before or after" involved all time present, past and future, and that the only construction to be put on these words therefore was, "in the event of her decease, whenever that event might happen."

[It was scarcely possible, indeed, to put any other construction on this will. The reference was expressly to the age of twenty-one years; and therefore no room was left to imply a reference to any other or

(*x*) 23 L. J., Ch. 336.]

(*y*) Miles *v.* Clark, 1 Kee. 92; [see Tilson *v.* Jones, 1 R. & My. 553, *ante* p. *760.

additional period, as the death of the testator. The case differs, therefore, from the two preceding, in which the manner and not the period of death was the circumstance to which express reference was made.

A clearer illustration of the distinction is afforded by Cooper *v.* Cooper, (*z*) in which a testator bequeathed the residue of his personal estate equally between his four children (naming them,) and in case of the death of either of them leaving issue then the issue of such child to take the parent's share; but in the event of their dying without leaving issue then the share of the one so dying to become part of the residue of his personal estate. There being no words in the primary bequest expressly giving an absolute interest, (as there were in Clayton *v.* Lowe and Gee *v.* Mayor of Manchester,) there was no danger of imputing two inconsistent intentions to the testator in refusing to hold the bequest absolute upon the testator's death: and it was therefore held by Sir W. P. Wood, V. C., that the children took life interests only. (*a*)

The event restricted to the testator's death by the context.

The general rule which permits the gift over to take effect upon the happening of the contingency at any time after the testator's death is of course excluded by any context which shows that the testator did not intend it so to operate. Thus in In re Anstice, (*b*) where a testatrix gave the residue of her personal estate to trustees in trust to pay and divide the same in equal shares between her two cousins A and B; and "in case either of them should be married *at the time of her said legacy becoming *payable, then* the same shall be paid or disposed of for her separate use, *and her receipt alone for the same shall be a sufficient discharge;*"[9]

(*z*) 1 K. & J. 658.

(*a*) See also Bowers *v.* Bowers, L. R., 5 Ch. 244; Gosling *v.* Townshend, 2 W. R. 23. Rogers *v.* Waterhouse, 4 Drew. 329, and Rogers *v.* Rogers, 7 W. R. 541, cannot be relied on *contra.*

(*b*) 23 Beav. 135.]

9. In Rogers *v.* Rogers, 11 R. I. 38, the testator directed that a division should be made among the children of his trustee "now living, or their legal heirs * * * if any of them be dead when this bequest takes effect." In commenting upon this provision of the will, it was said by Durfee, J., at page 76: "An important question to determine is, what time is signified by the words 'when this bequest takes effect.' Does it mean when the widow dies, and when the division shall be made? If so, until then the persons designated cannot be known, and their interests cannot vest, or not indefeasibly at least. The obvious answer to the question is, that the bequest takes effect when the will takes effect. But is this what the testator meant? We are not entirely sure; but we find nothing in the words or their context to convince us that he did not mean this; and we must therefore take the obvious meaning of the words as the meaning in which the testator employed them. This view relieves the bequest of

and in case either of them should die without leaving issue, then her share to go to her sister; and in case both should die without leaving issue, then over; it was held by Sir J. Romilly, M. R., that this meant death in the testatrix's lifetime, for the legatees (if married) were to be competent to give a full discharge for their legacies when they became payable, which was inconsistent with a gift over upon an event to happen at any time during their lives.

So where the gift was to several as tenants in common, and in case any of them should die without leaving issue, the shares of them so dying were to go to the others and to the issue of such of them as should die leaving issue in equal shares, such issue to take the shares which their respective parents would have taken *if living;* it was clear that the interest of the original legatees was not to be defeasible during their whole lives. (*x*) And the circumstance that one of several alternative gifts over is expressly confined to death without issue under twenty-one is a strong argument that the other, though in terms indefinite, was intended to be so confined too.[10] (*y*)

Again in Clark *v.* Heury, (*z*) where a testator gave all he possessed to be equally divided between his sisters A. and S. for their sole use and benefit independent of any one they might marry; and directed his personal property consisting of clothes, plate, wines, stores, musical instruments, cabin furniture, &c., to be sold and the proceeds invested in his sisters' names as they should direct, his sister A. (who had attained the age of twenty-five) to have the immediate control of her share of his personal property, and his sister S. on attaining the age of

any uncertainty in regard to the persons who are to have the benefit of it, in so far as any uncertainty arises from the words under review, and, inasmuch as the persons can be ascertained at the death of the testator, is entirely consistent with their taking vested interests."

[(*x*) Johnston *v.* Antrobus, 21 Beav. 556 (the share of residue.) There was also a gift over on death leaving issue; but the decision was based on the clause in the text.]

10. In Fahrney *v.* Holsinger, 65 Penna. St. 388, the gift of a fee to A, with remainder over "if she die without heirs," was construed to refer to a death without issue *in the testator's lifetime.* So, too, Caldwell *v.* Skilton, 13 Id. 152; Biddle's Estate, 28 Id. 59; Schoonmaker *v.* Stockton, 37 Id. 461; Shutt *v.* Rambo, 57 Id. 151; Brown *v.* Brown, 1 Dana 43; Gibson *v.* Walker, 20 N. Y. 476; Downing *v.* Marshall, 23 Id. 366, holding that "death without issue" *included* the case of death in testator's lifetime. But see Jessup *v.* Smuck, 16 Penna. St. 340, in which case Clayton *v.* Lowe, 6 B. & Ald. 636, is referred to by Chambers, J., as "not a case of such deliberate adjudication as to be relied on." In this case, death of devisee "before he marries" was not confined to such death in testator's lifetime.

[(*y*) Brotherton *v.* Bury, 18 Beav. 65.

(*z*) L. R., 11 Eq. 222, 6 Ch. 588.

twenty-five, until which time her uncle W. would hold it in trust for her; and in case of the death of either sister before the testator *or* before marrying and having children, the whole of the property he might die possessed of to go to the survivor. It was held that A. on attaining twenty-five, although she had not married, was absolutely entitled to a moiety. There might be some difficulty, it was observed, in applying the words of the gift over to both sisters; but they must be construed with reference to the former words: whatever else the testator may have meant, he *certainly meant that when either sister attained twenty-five she should have her share.

And in Ware *v.* Watson (*a*) where a testator gave his residuary estate "to be divided into six equal shares, being as many as I have children now living, one of the said shares to be for the benefit of each of my said children in manner hereinafter mentioned, the share of each of my sons W., H., and J. to be paid, assigned and transferred to him as soon as convenient after my decease, and the shares of daughters E., A., and S. to be vested interests for their benefits in manner hereinafter mentioned:" provided that if any of his said sons *should die without issue living at his decease* his share (accruing as well as original) should go to the survivors equally: the trustees were then directed to stand possessed of the shares of the daughters in trust for them for life and afterwards for their children, and in default of children, for the survivors or survivor of the sons and daughters: it was held by K. Bruce and Turner, L. JJ., that the shares of the sons vested in them indefeasibly on the testator's death, the gift over of those shares operating only in case of death in his lifetime; the marked distinction made between the shares of the sons and those of the daughters being considered to show that, whatever effect the words "pay and divide" might have had if they had stood alone, the testator meant something different from a direction that the shares should be vested when he used the words "pay and transfer."]

Rule where there is a prior life or other interest.

II.—2. In all the preceding cases it will be observed that the gift to the person on whose death, under the circumstances described, the substituted gift was to arise, was immediate, *i. e.*, to take effect in possession; so that the court

(*a*) 7 D., M. & G. 248. See also Lloyd *v.* Davies, 15 C. B. 76 (devise to three in common, with gift over on marriage of one to the other two, they paying her £500 within one year from testator's death); Vulliamy *v.* Huskisson, 3 Y. & C. 80 (direction to settle legacy in case of marriage.)]

was placed in the alternative of construing the words either as applying exclusively to death in the lifetime of the testator, or as extending to death at any time, the will supplying no other period to which the words could be referred: but where the two concurrent or alternative gifts are preceded by a life or other partial interest, or the enjoyment under them is otherwise postponed, the way is open to a third construction, namely, that of applying the words in question to the event of death occurring before the period of possession or distribution, so that the original legatee, surviving that period, would become absolutely entitled.[11]

Gift over on death without leaving issue not generally confined to prior interest.

*[It is settled, however, that in this case, as well as where the original gift is immediate, the substituted gift will *prima facie* take effect whenever the death under the circumstances described occurs. Thus, in O'Mahoney *v.* Burdett, (*b*) where a testatrix bequeathed £1000 to her sister A for life, and after her death to A's daughter B: "if my said niece should die unmarried or without children the £1000 I here will to revert to" C. A died; then the testatrix; and afterwards B died without children; and it was held in D. P. that the legacy went over to C, on the ground that this was the natural and proper meaning of the words, and that there was no context which rendered a different meaning necessary or proper. The inconvenience of suspending the absolute vesting of the gift during the whole lifetime of the legatee could not control the natural meaning of the terms of the bequest.

So, in Ingram *v.* Soutten, (*c*) where a testator gave a mixed residue in trust for his wife for life, and after her death or second marriage in trust in moieties for his two daughters for their lives, and afterwards for their children respectively; if either daughter should have no child her moiety to go to the other daughter and her children; and if neither

11. In Dominick *v.* Moore, 2 Bradf. 201, it is said that a clause of survivorship is ordinarily referable to the death of the testator, unless the distribution is postponed until the determination of a life estate, in which case the weight of authority *seems* to incline in favor of referring the survivorship to the period of distribution.

For cases in which words of survivorship have been held to relate to the time of the death of the testator, see *ante* p. 572, note 4. But for cases where they have been held to refer to the death of the first taker, or the happening of the contingency on which the gift was to take effect, see *ante* p. 579, note 5.

[(*b*) L. R., 7 H. L. 386.

(*c*) L. R., 7 H. L. 408, reversing In re Heathcote's Trusts, L. R., 9 Ch. 45, and restoring decision of Malins, V. C., Id. 47, n. See also Benn *v.* Dixon, 16 Sim. 21.

daughter should have a child to attain twenty-one, then the whole to be in trust for his two sons as tenants in common and their respective executors, &c.; but if either son should die without leaving issue living at the time of his decease, then the whole to devolve and be in trust for the other, his executors, &c. But if both sons should die without leaving issue living at their respective deaths, then in trust for M., a granddaughter of the testator, her executors, &c.; but if she should die without leaving issue living at the time of her death, then in trust for such one or more of the daughters of P. and G. as should be living when the trusts thereinbefore declared should determine, their executors, &c.; and if there should be no such daughter of either of them at that time living, then in trust for C., his executors, &c. First, the wife died; then the sons; and afterwards the daughters; neither of the sons or daughters had any issue. M. survived them, and afterwards died without ever having issue. At that time there was living only one daughter of P. and no daughter of G. It was held by James, L. J. (Mellish, L. J., concurring,) that M., having survived the tenants for life, took an indefeasible interest. *The general rule, he said, was, as laid down in Edwards *v.* Edwards, (*d*) that, where there was an absolute gift to vest in possession at a future time, and a gift over if the legatee should die without issue living at his death, this *prima facie* meant if he should so die before he was entitled to call for delivery, as it would be very inconvenient that after delivery the subject should be liable to go over: and there was nothing in the present case to take it out of the general rule. But this was reversed in D. P., and the alleged rule was denied, as unwarrantably altering the natural meaning of the words, which clearly expressed a dying without issue living at the death, at whatever time that death might take place.[12]

Contingency restricted by context.

The rule being as thus laid down in D. P., it is to be considered what species of context will exclude it and confine the operation of the gift over to death occurring before the period of possession. An example of such a context] is afforded by Da Costa *v.* Keir, (*e*) where a testator gave the residue of

(*d*) 15 Beav. 364, 365.]

12. The bequest of personalty in remainder after a life estate, with limitation over on the remainderman's dying without issue, intends such death to occur, if at all, before the termination of the life estate, Umstead and Reiff's Appeal, 60 Penna. St. 366. Not so, however, a gift to A and B, "as soon as A arrives at the age of 22 they shall have possession and if either die without issue *before coming into possession*," over, McCullough *v.* Fenton, 65 Penna. St. 418.

(*e*) 3 Russ. 360.

Edwards *v.* Edwards (*l*) was itself a case of that kind. The testator there devised freeholds and leaseholds in trust for his wife during her life or widowhood. He then devised part of the property to his eldest son "for him and his heirs to possess immediately after his mother's death or marriage." He then made similar devises to a daughter and to another son; and continued—"If my said wife shall remain my widow my trustees shall assign and transfer to each of my children their shares immediately after her death and as soon as they arrive at twenty-one. * * Further, if one of my three children shall die and leaving no children, his or her share shall be divided between the other two and for their heirs forever; and if two of my children shall die and leaving no children, their shares shall go to the surviving one and his or her heirs forever." It was held by Sir J. Romilly, M. R., that the contingency of death leaving no children was to be confined to the life of the tenant for life. His decision was, indeed, based on the supposed general rule cited and relied on by Sir W. James in Ingram *v.* Soutten, but denied on appeal of that case. But in O'Mahoney *v.* Burdett, Lord Selborne said—"Edwards *v.* Edwards was a case in which a distribution by assignment or transfer was expressly directed to be made after the death of the tenant for life, *thereby prima facie* terminating a trust which down to that time was to continue." Lord Hatherley spoke to the like effect; and Lord Cairns said—"The direction for assignment and transfer coupled with immediate and absolute possession may well have justified the decision." (*m*)

*Another case of the same kind, prior to O'Mahoney *v.* Burdett, was Dean *v.* Handley, (*l*) where a testator devised his real estate to trustees upon the trusts afterwards declared, and gave to the trustees his business in trust to carry it on; and gave them the residue of his personal estate in trust for sale; and to stand possessed of the proceeds and of the real estate in trust out of the income and the profits of the business to pay a life annuity to his wife for the support of herself and his son, and after her death to pay and make over, and he thereby devised and bequeathed all the said real and personal estate, including all accumulations and the business, unto his said son, his heirs, execu-

But in Arnold *v.* Arnold, 11 B. Mon. 81, 87, it was contended that, there being a direction to distribute on the happening of a future event, those only could take who were living at the period of distribution, and that those of the devisees who were living at the death of the testator, but died before the period of distribution took nothing.

[(*l*) 15 Beav. 357.

(*m*) L. R., 7 H. L. 394, 400, 405.

(*l*) 2 H. & M. 635.

tors, administrators and assigns: "And my will further is that in case my said son shall happen to depart this life without leaving lawful issue him surviving, then I direct my trustees and the survivors of them," &c., to sell all the real and personal estate and to hold the proceeds upon the trusts therein mentioned. It was held by Sir W. P. Wood, V. C., that the son having survived the widow was absolutely entitled to the whole estate. His decision, as reported, proceeded on the supposed general rule in Edwards *v.* Edwards; but in O'Mahoney *v.* Burdett, (*m*) he said:—"It was a trade which was directed to be carried on by the executors until the son attained a certain age, when the trade (and not the trade only but other property as well) was to be handed over to him. * * I held in that case, and I should be disposed to hold the same again in a similar case, that the time was evidently pointed out when the final and complete distribution was to be made, and that the executory devise must be held to be referred to that time, because it was impossible to call the property back again and hold that the executory devise was then to take effect after there had been that full and complete distribution of the funds."

A question of the same kind afterwards arose in Olivant *v.* Wright, (*n*) where a testatrix having separate real and personal *estate gave it to her husband for life; "and after his decease to be divided amongst my five children, share and share alike; and if any of my children should die without issue, then that child or children's share shall be divided, share and share alike, among the children then living; but if any of my children should die leaving issue, then that child (if only one) shall take its parent's share, and if more than one, to be divided equally amongst them, share and share alike." It was held by Sir J. Bacon, V. C., that the case was within the rule laid down in D. P.; that the share of a child who survived the tenant for life leaving issue passed to the issue; and that the share of another child who afterwards

(*m*) L. R., 7 H. L. 403. The following cases were decided before O'Mahoney *v.* Burdett on the supposed general rule in Edwards *v.* Edwards. Most if not all of them might perhaps be supported on special grounds; and it may be observed that none of them were bare cases of successive trusts like the two cases in D. P. See In re Allen's Estate, 3 Drew. 380; Johnson *v.* Cope, 17 Beav. 561; Beckton *v.* Barton, 27 Beav. 99; Slaney *v.* Slaney, 33 Beav. 631; In re Hill's Trusts, L. R., 12 Eq. 312. On special grounds the contingency was held in Milner *v.* Milner, 34 Beav. 276, (settlement,) and Witham *v.* Witham, 3 D., F. & J. 758, (direction to settle shares of daughters if they should marry,) not to be confined to the life of the tenant for life; and in Smith *v.* Colman, 25 Beav. 216, (similar direction to settle,) to be confined to the death of the testator.

(*n*) L. R., 20 Eq. 220, 1 Ch. D. 346.

died without issue passed to the three children *then* surviving. On appeal this was reversed on the ground that the testatrix clearly intended an actual and final division to be made at the death of the tenant for life. Sir W. James observed that all was consistent with that intention, and that any other construction would lead to so many absurdities and contradictions that he could not bring himself to entertain a doubt. He said the natural meaning of "then" would be the time of division which had before been spoken of as to be made at the death of the tenant for life. Sir G. Mellish said that, according to the respondent, there might be several periods of division, and what was to happen if all the five children one after the other died without issue did not exactly appear. Sir G. Bramwell observed that, according to the respondent, the surviving children took the shares of the child dying without issue to the exclusion of the issue of the child who died with issue, which certainly was unreasonable; and further that a grandchild dying during the life of the tenant for life would take that which a child dying during the life of the tenant for life would not take, which also seemed unreasonable.

Contingency restricted to avoid inconsistency in gift over.

The difficulties here suggested do not appear to be very formidable. (*o*) That they were considered to be so in Olivant *v.* Wright, may probably be taken as evidence that an express direction to distribute needs little assistance from the context to exclude the general rule which reads death without issue as meaning death at any time. If, indeed, by so reading the will absurdity or contradiction is really produced in the ulterior trusts, which is avoided by confining the contingency to the limited *period, there is strong ground for adopting the latter construction, even although the will contains no express direction to distribute, and no trust. (*p*)

Contingency restricted by express direction to convey.

The effect of an express direction to convey at a particular time is further shown by Wheable *v.* Withers, (*q*) where a testator gave real and personal estate to trustees, in trust for his wife for life, and after her death *to convey and assure, pay and divide* the same unto and amongst all his children

(*o*) See *ante* p. *786, n. (*t*), and Lord Hatherley's judgment, Bowers *v.* Bowers, L. R., 5 Ch. 250; also *ante* p. *188.

(*p*) See Besant *v.* Cox, 6 Ch. D. 604. But the report does not make it clear how in this particular case the words ("that shall leave such lawful issue") which caused the difficulty upon one construction were made intelligible by adopting the other.

(*q*) 16 Sim. 505. See also Whiting *v.* Force, 2 Beav. 571; Glyn *v.* Glyn, 26 L.

in equal shares *on their respectively attaining twenty-one;* and in case of the death of any of them without issue under that age, or before acquiring a vested interest, (*r*) then to *convey, &c.*, his part to the survivors; but in case any of the testator's children *should die at any time either before or after him* having issue, then *to convey, &c.*, his part to such issue. All the children having attained twenty-one, it was held by Sir L. Shadwell, V. C., that they had become indefeasibly entitled. He thought the words "under twenty-one" must of necessity be implied in the gift over to issue, since the trustees having under the first trust executed an absolute conveyance to the children at twenty-one would have nothing left in them to enable them to execute the last trust as it stood in the will.

Contingency restricted to minority of legatees rather than to lifetime of tenant for life.

In the last case, it appears that the wife was dead, but not when she died; nor was it suggested that the time of her death furnished a limit to the contingency. That it is not the time of eventual distribution, but the time pointed out by the express direction to distribute, that fixes that limit, is more distinctly shown by In re Johnson's Trusts, (*s*) where a testator devised real estate to his wife for life, remainder to trustees in trust to sell, to invest the proceeds, and to apply the income in bringing up his nephews and nieces, the children of his sister S., during their respective minorities; and upon further trust to pay his nephews and nieces their respective shares when and as they should respectively attain twenty-one; if any of them should die without leaving issue, their shares to be paid to the survivors when their original shares were payable as aforesaid; if any of them should be of age at the time of sale, their shares to be paid im*mediately after the sale. All the nephews and nieces but two died before the wife, some under age, others after attaining twenty-one, and some leaving issue, others not. It was held by Sir W. P. Wood, V. C., that a nephew or niece became indefeasibly entitled on attaining twenty-one. He observed that the court always leaned towards the construction which vested a provision for children at the time when it was most likely to be required. He thought the testator had plainly expressed his intention that the original shares should vest at twenty-one, and that the period of survivorship as to the accruing shares was to be the period of the vesting of original shares.]

J., Ch. 409 (distribution directed at twenty-five, with gift over of the share of the eldest if he came into settled estates.)

(*r*) These last words were held to be merely tautologous.

(*s*) 10 L. T. (N. S.) 455.]

Contingency restricted to period of vesting.

The restricted construction prevailed, partly on the authority of Galland *v.* Leonard, in the more doubtful case of Home *v.* Pillans, (*u*) where a testator bequeathed to his nieces C. and M. the sum of £2000 each, when and if they should attain their ages of twenty-one years; and which said legacies he gave to them for their sole and separate use, free from the debts or control of their or either of their husbands: *and in case of the death of his said nieces or either of them leaving children or a child*, the testator bequeathed the share or shares of each of his said nieces so dying unto their or her respective children or child. Sir J. Leach, M. R., held that the nieces did not take absolute interests at majority; but that the bequest to them continued to be liable to the executory gift, on their dying leaving children. Lord Brougham, C., reversed the decree, on the ground that the construction adopted by the court below was irreconcilable with the authorities, especially those cases in which words referring to death generally had been held to be restricted to death occurring in the lifetime of the prior legatee for life, (*x*) and he adduced Galland *v.* Leonard as an authority precisely in point. He also dwelt on the inconvenience of holding the absolute vesting to be suspended during the life of the legatee, which was a construction the court would never adopt but from necessity; and he considered that, in the present instance, such a construction would have the effect of defeating the testator's intention, which evidently was, that at the age of twenty-one the legacies should become absolutely vested.

Remark on Lord Brougham's judgment in Home *v.* Pillans.

It is observable that Lord Brougham, in his remarks on Hervey *v.* McLauchlin (*y*) and that class of cases, but very faintly adverts to the fact, that in them the gift over was in case of death *simpliciter*, and in the will before him it was in case of *death *in connection with a collateral event* (*i. e.*, leaving children,) which forms a most material distinction, and excludes from the latter case much of the reasoning adopted by him from the cited authorities. The point which he had to decide was certainly one of great difficulty. [But the decision has frequently been recognized as correct. Thus in Randfield *v.* Randfield, (*z*) where a testator devised real estate to his son when he attained twenty-one, with a gift over if he should die leaving no issue, but where under the circumstances

Home *v.* Pillans, approved by Lord Kingsdown.

(*u*) 2 My. & K. 15.
(*x*) *Vide ante* p. *756.
(*y*) 1 Pri. 264.
[(*z*) 8 H. L. Cas. 225, 231, 240. See

the words "when he attained twenty-one" were taken *pro non scriptis*, Lord Kingsdown said that he thought the rule laid down in Home *v* Pillans was a perfectly sound one, and that it ought not to be disturbed, though it could not apply there. "If," he added with reference to the case before him, "there had been two contingencies to which the words might have been applicable they would I think have been properly applicable to the first, the dying under twenty-one; but that contingency did not exist when the will was executed, and they can be applicable therefore only to the other." As was said in the argument of that case, it is highly improbable that the testator could mean to give the estate absolutely to his son upon his attaining twenty-one, and then take it away again after the son had attained that age.

Contingency restricted to period of vesting.

Again, in Monteith *v.* Nicholson, (*a*) where a testator gave his personal estate to his brothers and sisters living at his decease, their executors, administrators and assigns, as tenants in common, and declared that *if any of them should die in his lifetime or afterwards without leaving lawful issue*, the share or shares of him, her or them so dying should go to and be equally divided amongst the survivor or survivors of them; *and if any of them should die in his lifetime or afterwards leaving issue*, the share or shares of him, her or them so dying should go to and be equally divided amongst such issue, such child or children taking their parent's share. "And, moreover, I declare it to be my will, that none of the legatees under this my will shall be entitled to any bequest until they severally attain the age of twenty-one years." It was held by Lord Langdale, M. R., that each of the brothers and sisters took an absolute vested interest on attaining the age of twenty-one years.

On the same principle, if the gift after a life estate is con*tingent on the legatee surviving the tenant for life, a gift over if he dies without leaving issue will, it seems, be restricted to death in the lifetime of the tenant for life. (*b*)

This construction however may be excluded if, besides the gift over in question, there is another gift over expressly in case of death before the time of vesting. (*c*) Nor has it been generally extended to cases

and consider the explanation of this case given by Lord Cairns, L. R., 7 H. L. 397.

(*a*) 2 Kee. 719. See also In re Dowling's Trusts, L. R., 14 Eq. 463.

(*b*) Andrews *v.* Lord, 6 Jur. (N. S.) 865; In re Sarjeant, 11 W. R. 203. And see judgment in Garvey *v.* Whittingham, 5 Beav. 270.

(*c*) Martineau *v.* Rogers, 8 D., M. & G. 328.

of immediate gift, vested in point of interest, but where possession is directed to be given or payment made at a specified time. (*d*)]

Word "payable" occurring in gift over, whether it refers to majority or the period of distribution.

And here it will be convenient to notice the frequently occurring point of construction arising on the word "payable," in such a case as the following:—A money fund is given to a person for life, and, after his decease, to his children at majority or marriage, with a gift over in the event of any of the objects dying before their shares become *payable*. In such cases it becomes a question whether the word "payable" is to be considered as referring to the age or marriage (or any other such circumstance affecting the personal situation of the legatee,) on the arrival or happening of which the shares are made "payable," or to the actual period of distribution; in other words, whether the shares vest absolutely at the majority or marriage of the legatees, in the lifetime of the legatee for life; or whether the vesting is postponed to the period of such majority or marriage, *and the death of the legatee for life*. As the latter construction exposes the legatees to the risk of losing the testator's provision in the event of their dying in the lifetime of the legatee for life, although they may have reached adult or even advanced age, and may have left descendants, however numerous, the courts have strongly inclined to hold the word "payable" to refer to the majority or marriage of the legatees, especially if the testator stood towards the legatees in the parental relation.[14]

And where (as often happens) the question has arisen under marriage settlements, (*e*) the leaning to this construction is *strongly aided by the occasion and design of the instrument, whose primary object

(*d*) Smith *v.* Spencer, 6 D., M. & G. 631, explained 2 H. & M. 639; Cotton *v.* Cotton, 23 L. J., Ch. 489; Else *v.* Else, L. R., 13 Eq. 196.]

14. See Field *v.* Hallowell, 12 B. Mon. 517; Fairly *v.* Kline, Penn. (N. J.) 322, 327; Rutledge *v.* Rutledge, Dudley Eq. 201.

(*e*) Emperor *v.* Rolfe, 1 Ves. 208; Wookcock *v.* Duke of Dorset, 3 B. C. C. 569; Hope *v.* Lord Clifden, 6 Ves. 499; Schenck *v.* Legh, (which is a leading case,) 9 Ves. 300; Powis *v.* Burdett, Id. 428; Howgrave *v.* Cartier, 3 Ves. & B. 79; Perfect *v.* Lord Curzon, 5 Mad. 442; [Evans *v.* Scott, 1 H. L. Cas. 43, 11 Jur. 291; In re Williams, 12 Beav. 317; Mount *v.* Mount, 13 Id. 333; Bailie *v.* Jackson, 1 Sm. & Gif. 175; Swallow *v.* Binns, 1 K. & J. 417; Walker *v.* Simpson, Id. 713 (will); Moor *v.* Abbott, 26 L. J., Ch. 787, 3 Jur. (N. S.) 551; Remnant *v.* Hood, 27 Beav. 74, 2 D., F. & J. 396; Currie *v.* Larkins, 4 D., J. & S. 245. But see Whatford *v.* Moore, 7 Sim. 574, 3 My. & C. 289; Lloyd *v.* Cocker, 19 Beav. 140; Jeyes *v.* Savage, L. R., 10 Ch. 555.]

obviously is, to secure a provision for the issue of the marriage.[15] In wills, the point, like all others, depends solely upon the intention to be collected from the context; and the cases will be found to present instances of the vesting being held to take place at majority, or at majority or marriage (as the case may be,) in the lifetime of the legatee for life, or to be further suspended until the period of actual distribution, according as the language of the will was deemed to admit or to exclude the more eligible and convenient construction.

Word "payable" referred to majority, not to period of distribution.

[Thus, in Salisbury *v.* Lambe, (*f*) where a testator by his will appointed £2000, in trust for the separate use of his daughter S., and afterwards in trust for her daughters and younger sons as she should appoint; in default of appointment, in trust for her daughters and younger sons equally, to be paid at twenty-one or marriage; in case any of them should die or become heir male of S. before his, her or their share became *payable*, such share to go to the survivor; if all should die before their shares became *payable*, then to S.; S. survived all her children; but Lord Northington held that they took transmissible interests on attaining twenty-one or marriage.][16]

So, in Halifax *v.* Wilson, (*g*) where a testator gave to trustees all his estate and effects, upon trust to lay out the proceeds thereof, after payment of debts, upon security, and pay the interest to his mother, R. M., for life; and, after her decease, upon trust to pay and transfer the said trust moneys unto and among his nephew and nieces; their respective shares, with the accumulated interest, to be paid or transferred to them at their respective ages of twenty-one years; and in case any of his said nephew and nieces should happen to die before his, her or their share or shares in the said trust moneys and premises should become *payable*, then the testator directed that the share or shares of him, her or them so dying should go or be paid to the survivors or survivor; and in case of the death of all his said nephew

15. In Rutledge *v.* Rutledge, Dudley Eq. 201, in which case there was a marriage settlement of property to husband and wife, and to the survivor for life, and after the decease of both to the issue of the marriage, if any, but, if none, or should such issue die during the lives of husband and wife, or the survivor, then to the survivor, it was held that the children of the marriage took, under the settlement, vested interests as they were born, not depending on the event of surviving their parents.

[(*f*) 1 Ed. 465.]

16. So, too, Conwell *v.* Heavilo, 5 Harring. 296.

(*g*) 16 Ves. 168.

and nieces before the said trust moneys should become *payable*, the testator gave the same to his trustees, share and share alike. The question was, as to the destination of the *share of the nephew who attained twenty-one and died in the lifetime of the testator's mother. Sir W. Grant, M. R., held that the share in question vested absolutely at majority. "The testator," he observed, "has used the word 'payable,' a word of ambiguous import; in one sense, and with reference to the capacity of the person to take, he had just before declared that the age of twenty-one was the period at which their shares were to be payable: in another sense, with reference to the interest of the tenant for life, they would not be payable until her death; but then it is with the direction to pay at the age of twenty-one that the bequest over is immediately connected; and it is to that period of payment, as it seems to me, that the subsequent words are most naturally to be referred. The declaration, that the shares should be paid at the age of twenty-one, naturally led the testator to consider, what was to become of the shares of those who should not live to attain that age; and there he adds the direction, that the shares should go over. I think it is no strain to understand him as adverting merely to the age of twenty-one, which he had just before appointed as the period of payment."

So, in Walker *v.* Main, (*h*) where a testator devised real estate to his wife for life, and after her decease to a trustee upon trust for sale, and directed the produce to be distributed among his children and grandchildren in the following manner:—He first gave to several of his grandchildren £20 each, to be paid on their attaining the age of twenty-one years or marrying; and, after bequeathing other legacies, gave to his four children the residue of the money arising from the sale, to be equally divided between them by his trustee as soon as each of them should attain to their respective age or ages of twenty-one years; but upon marriage, whether of age or not, each of their receipts should be a sufficient discharge. But if any or either of his said children or grandchildren should happen to die before the time of such legacy becoming *due and payable*, then the testator gave the share of such child or children or grandchildren, so dying, unto and among those that should be then living. Two of the grandchildren attained twenty-one, and married, and died in the lifetime of the widow; and Sir T. Plumer, M. R., on the authority of the cited cases, and especially of Sir W. Grant's deci-

Word "payable" referred to majority, not to period of distribution.

(*h*) 1 J. & W. 1.

sion in Schenck *v.* Legh, (*i*) *held that the shares vested absolutely at twenty-one or marriage, in the lifetime of the prior *cestui que trust.*

On the other hand, in Bright *v.* Rowe, (*k*) where a testatrix by virtue of a power appointed the reversion of a sum of £2000, in which she and her husband had life interests, to trustees, upon trust for her daughter M., or any other children she might thereafter have by her husband J., to be equally divided between them: but it was her will that, in case the £2000 should become *payable before M. should attain twenty-one* or day of marriage, or before any other of her children, being a son, should attain twenty-one, or being a daughter, the same age, or marry, then the trustees to invest the same, and apply the interest of each child's share for maintenance; and when any such children, being sons, should attain twenty-one, or being daughters the like age or day of marriage, upon trust to pay them their respective shares of the principal with the unapplied interest: and in case her said daughter M., or any other child she might have by her husband should happen to die before his, her or their portion or portions of the said sum of £2000 should become *payable,* then the same should respectively go and belong to the survivors or survivor of them. The testatrix left three children, two of whom died in the lifetime of her husband (who, it will be remembered, had a life interest under the settlement) after having attained twenty-one. Sir J. Leach, M. R., while he admitted the presumption in favor of the vesting of children's shares where the will was ambiguously expressed, yet considered that there was no ambiguity here; and that, by dying before the portions became payable, the testatrix meant dying in the lifetime of her husband, and consequently that the shares of the deceased children had devolved to the survivors.

Word "payable" referred to period of distribution.

[It was probably considered in this case that the testator had so contrasted the time when the legacy should become payable with the time of attaining twenty-one as to exclude the notion that they were identical. That it was not considered to impair the authority of the previous cases appears by] Jones *v.* Jones, (*l*) where a testator bequeathed £10,000 to trustees, upon trust for A for life, and from and after his decease, then to pay it to the children of A, when and as they should severally attain the age of twenty-one years; [and in case any of the said children should *die before his, her

Word "payable" referred to period of majority.

(*i*) 9 Ves. 300.
(*k*) 3 My. & K. 316.
(*l*) 13 Sim. 561. [See also Butterworth *v.* Harvey, 9 Beav. 130.

or their shares should become *payable* leaving issue, then the share or shares of him, her or them so dying to go and be paid unto his, her or their respective issue equally;] and in case any of the said children should die before his, her or their share or shares should become *payable* leaving no issue, then the share or shares of him or them so dying to go to and amongst the survivors or survivor; [but in case A should have no child, or his children, if any, should all die *under age* and without issue, then over.] A son of A attained twenty-one, but died in A's lifetime; Sir L. Shadwell, V. C., held that his personal representative was entitled to an aliquot share. His Honor [adverted to the ultimate gift over if all should die *under age*, and was] of opinion that the word "payable" meant *attain twenty-one*.

Word "payable" implied and referred to majority.

[Again, in Woodburne *v.* Woodburne, (*m*) where a testatrix gave a legacy to trustees in trust to pay the interest for the maintenance of A, and when he should attain the age of twenty-one to pay him the principal; if he should die before his legacy became *due and payable* leaving issue, such issue to be entitled to the legacy in the same manner as the parent would have been entitled if living. As to the residue, she directed her trustees to pay one moiety of the interest to B for life, and that after B's death one moiety of the principal should be paid to A, at the time when his other legacy became due and payable, for his own absolute use and benefit; and in case of his death without leaving issue, then over.[17] A attained twenty-one and died without issue in the lifetime of B (who, it appears, was still living.) Sir K. Bruce, V. C., remarked that the will gave the issue a contingent interest in the particular legacy, but not in the share of residue; and that this contingent interest was only given if A died under twenty-one. Looking at the whole will, he thought that the legatee having attained his majority did not lose his share of the residue, although he died without leaving any issue.

Distinction where the issue of the legatee are expressly provided for.

Sir L. Shadwell took no notice of the point which was pressed upon him in Jones *v.* Jones, and which was perhaps glanced at by Sir K. Bruce in Woodburne *v.* Woodburne, that as the will made express provision for the issue of children there was no reason for adopting a construction the chief or only object of which was indirectly to provide for such issue. He probably considered that the terms of the ultimate gift over made that *construction inevitable. The same construction, however, notwithstanding

(*m*) 3 De G. & S. 643.]

17. See Weyman *v.* Ringold, 1 Bradf. 40.

a similar argument, was adopted by the same judge in the previous case of Mocatta *v.* Lindo, (*n*) where the trusts of a marriage settlement, after the deaths of husband and wife, were for all and every the children of the marriage share and share alike, *to be paid and payable* to them at twenty-one or on marriage, and to the children or issue of such children of the marriage as should die leaving children before their respective shares should become payable *as before mentioned;* but if any such children should die before their shares should become payable without leaving any issue, then over. So, in Mendham *v.* Williams, (*o*) where after the death of the tenant for life the trust was to divide the fund equally between the testator's children, their shares to be *vested* in them as and when they should attain twenty-one or (as to daughters) be married; and to apply the income during minority for maintenance; [18] (*p*) with a gift over to the issue of any of the children who should die leaving issue before their respective shares should *become due and payable;* Sir W. P. Wood, V. C., thought it was too thin a distinction to rely upon for him to say that there was here a gift over to the issue; and he held that the share of a child who attained twenty-one was not divested by her death in the lifetime of the tenant for life leaving issue.

In re Willmott's Trusts.

But, in In re Willmott's Trusts, (*q*) where by marriage settlement stock was settled in trust for husband and wife successively for life, and after the death of the survivor in trust to assign, transfer and dispose of the fund unto and amongst the children of the marriage "and the issue of such of them in case any of them shall be *then* dead" as husband and wife should appoint, and in default of appointment unto and amongst the children of the marriage in equal shares; and in case any of them should happen to be dead leaving issue, unto the issue of such one or more as should be then dead (*per stirpes*) equally to be divided amongst the children or their issue, to each being a son at his age of twenty-one, and to each being a daughter at her age of twenty-one or day of marriage; and in the meantime until their shares should become payable as aforesaid, to pay

[(*n*) 9 Sim. 56.

(*o*) L. R., 2 Eq. 396. Jones *v.* Jones was relied on, but without noticing the ultimate gift over in that case. See also West *v.* Miller, L. R., 6 Eq. 59, where, however, the point was not alluded to; In re Thompson's Trust, 5 De G. & S. 667.]

18. See *ante* vol. II., p. 468, note 21, and cases there cited.

[(*p*) As to the effect of this clause on the vesting in such a case, see vol. I., p. *850.

(*q*) L. R., 7 Eq. 532.

the income for maintenance; and in case any or either of the children should *die without issue before his, her or their share or shares should become *due and payable*, in trust to pay such share or shares to the survivors of the children and the issue of any one or more who should be dead leaving issue, in equal shares and when and as the original shares should become due and payable; and in case, at the death of the survivor of the husband and wife, there should be no child of the marriage, nor any issue of such child living, or if there should be any such then living, yet if all of them should die before his, her or their share or shares were payable, then over. A son attained twenty-one and died without issue in the lifetime of the surviving tenant for life. It was held by Sir W. M. James, V. C., that as provision was made for the issue of any child dying before the tenant for life, the rule of construction founded on Emperor *v.* Rolfe did not apply, and that the share of the deceased son went over to the surviving children of the marriage. He said that in Mocatta *v.* Lindo, it was held that "payable" there meant vested. (*r*) "I am bound to say (he added) I do not think I should have held upon that instrument that 'payable' meant 'vested.' In this case (he continued) there is no question about vesting at all. The question is one of divesting. The gift to the issue of a child dying does not depend upon the death of the child under twenty-one, as in Mocatta *v.* Lindo and Mendham *v.* Williams; but the gift to the issue of a child dying is to take effect upon the death of that child at any time during the life of the tenant for life."

Observations of James, V. C., on Mocatta *v.* Lindo, and Mendham *v.* Williams.

It will have been observed that in the cases referred to by the V. C., the gift over to issue was to take effect on the death of a child before his share "became payable," and that it was only by construction that the gift depended on the death of a child under twenty-one. The distinction however (whether it exactly answers those cases or not) appears to have this basis—that where the gift to issue is unequivocally intended to depend upon the death of a child under twenty-one, "payable" (occurring in a gift over upon the death of a child without issue) may properly be held to refer to the age of the child, since that is the period clearly indicated by the alternative clause, and if the word were held

(*r*) *Qu.* The interests of the children were clearly vested at birth. The question was (as in In re Willmott's Trusts) one of divesting, and was not treated *by the court* as one of vesting. But much of the phraseology of these cases was borrowed from those on portions charged on realty.

to refer to the death of the tenant for life (either specifically, or as being the period of actual distribution,) it would follow that a child attaining twenty-one, and afterwards dying *without issue in the lifetime of the tenant for life, would himself lose the share, while his issue would not get it.

The effect of an express provision for the issue of the legatee was again discussed in Haydon *v.* Rose, (*s*) where a testator gave real and personal estate to his son A for life, and after his death to be sold and the proceeds *to be paid and divided* among the testator's eleven grandchildren *as and when* they should respectively attain twenty-one, with a gift of the income of each share for maintenance; the share (accruing and original) of any grandchild who should die before such share should become *payable* without leaving a child was then given to the survivors; and the share of any grandchild who should die before such share should become payable leaving children was given to the children: notwithstanding In re Willmott's Trusts, it was held by Lord Romilly, M. R., that the share of a grandchild who attained twenty-one was not divested by this death in the lifetime of the tenant for life.

On the other hand, in Day *v.* Radcliffe, (*t*) where money was settled in trust for A and her husband successively for life, and after their several deaths in trust to pay, divide, transfer or assign the fund to the children of A and the issue of such children, *to be paid* to such as should be sons *at twenty-one* and to such as should be daughters at twenty-one *or marriage*, the issue of any child dying before his or her share should become *payable* to be entitled to the share which the parent would have been entitled to *if living;* but in case A should die without leaving any issue as aforesaid then to pay, transfer or assign the fund as A should by deed or will appoint. A son of A attained twenty-one, and afterwards died in the lifetime of A leaving issue. It was held by Sir G. Jessel, M. R., that independently of authority there could be no doubt that "before his share becomes payable" meant before the period of distribution, and that the representative of the deceased son was therefore not entitled to a share. "One remark (he said) which strongly tends to show this to be the meaning is that, if you read 'payable' as 'vested,' the provision in favor of issue can never

(*s*) L. R., 10 Eq. 224. The gift of income for maintenance appears to have made this an immediately vested interest.

(*t*) 3 Ch. D. 654. Cf. In re Thompson's Trust, 5 De G. & S. 667.

take effect as regards daughters, for a daughter cannot have children until she is married, and if she marries her share becomes vested." (u)

Again in Chell v. Chell, (x) where a testator gave his real and personal estate to trustees in trust for his wife for life, and after *her death for all and every of his children share and share alike until the youngest attained twenty-one, and on that event happening in trust for all and every of his children share and share alike and for their respective heirs and assigns; provided that if any of his children should die before their shares became transferable and *payable* without leaving issue, their shares should be transferred and paid equally among the survivors at such time as their original shares were made payable; but if any of his children should die before their shares became *payable* leaving issue, then the trustees were to transfer and pay the shares of such deceased children to their issue when they attained twenty-one. One of the children, who was living when the youngest attained twenty-one, died in the lifetime of the wife leaving issue; and it was held by Sir C. Hall, V. C., on the authority of In re Willmott's Trusts that the share of the deceased child was divested by the substitutionary gift. He said that the gift in Haydon v. Rose was to children at twenty-one, (y) and that was quite sufficient to distinguish it.

It is not stated whether the distinction here intended is between a vested and a contingent gift, or between a time named for payment which is, and one which is not, personal to the legatee. "Payable" seems to be as properly referable to the time of actual distribution (z) where the gift is contingent as where it is vested; since in either case the legatee must outlive the age or time named to acquire an indefeasible interest.]

Result of the cases.

In this state of the authorities, it seems not to be too much to say that the word "payable," occurring in the executory bequests under consideration, is held to apply to the age or marriage of the legatee, and not to the period of the death of the legatee for life, unless the latter is shown by the context to be intended by the testator: [but that, according to the great preponderance of present judicial opinion, an intention in favor of the latter will be inferred

(u) See, however, Mendham v. Williams, L. R., 2 Eq. 396.

(x) 23 W. R. 252, W. N. 1875, p. 6.

(y) But see *ante* p. *806, n. (s).

(z) As distinguished from the specific period of the death of the tenant for life. If *this* period were taken, then, in the event of the legatee outliving the tenant for life but dying under age, both the contingent gift to himself and the gift over to his issue would fail.

where in the event of the legatee dying at any time during the life of the tenant for life leaving issue, the legacy or share is given to the legatee's issue: (a) and similarly that an intention in favor of the actual period of distribution will be inferred where the legacy or share is given to the issue in the event of the legatee dying before the legacy or share becomes payable. (b) This is said to be the *natural meaning of the words, and to satisfy them and acquire an absolute interest the legatee must both attain twenty-one and survive the tenant for life.

Construction not varied by tenant for life dying before majority of legatee.

It is presumed that if upon the true construction of the will "payable" applies to the age or marriage of the legatee, the construction will not be varied by the accident of the legatee for life dying before the majority or marriage of the legatee in remainder; but that the interest of the latter will remain liable to defeasance during minority or until marriage. (c)

Where no time fixed for payment, "payable" refers to period of distribution.

But if no time is specified for payment, the word "payable" in the gift over will be held to refer to the death of the tenant for life, and the legatee in remainder must survive him in order to take. (d) The only alternative would be to consider that it was intended to prevent a lapse, a construction which, as we have seen, the courts do not readily adopt.

So under gift to such as survive tenant for life, notwithstanding time fixed for payment.

Again, if the original bequest be to such children only as survive the tenant for life, a gift over in the event of all the legatees dying before their shares become payable, will take effect if none of the legatees survive the tenant for life, although the will expressly directs payment at the age of twenty-one, and the legatees have attained that age; for no construction which may be put upon the word "payable" can enlarge the class who are to take the prior bequest. This was decided in a case (e) where in another part of the will the word "payable" clearly referred to the age of the legatees, it being provided in a clause

(a) In re Willmott's Trusts, L. R., 7 Eq. 532.

(b) Day v. Radcliffe, 3 Ch. D. 654; Chell v. Chell, 23 W. R. 252. If it be real estate which is thus given over to the issue, there is this additional reason against applying "payable" to the age of the legatee, viz., that a rule of construction which was designed to let in the issue ought not thus to be used to exclude all but one of them, viz., the heir-at-law, see per Hall, V. C., 25 W. R. 789.

(c) See Williams v. Clark, 4 De G. & S. 475.

(d) Creswick v. Gaskell, 16 Beav. 577. See also Crowder v. Stone, 3 Russ. 217, *ante* p. *691, where the point seems to have been assumed.

(e) Bielefield v. Record, 2 Sim. 354. See also Jeffery v. Jeffery, 17 Sim. 26; Hind v. Selby, 22 Beav. 373. And see Farrer v. Barker, 9 Hare 737.

following immediately after the direction to pay at twenty one or marriage, that the interest of the respective shares should be applied towards the maintenance of the legatees until their respective shares became *payable*.

Where no prior life estate, and no time fixed for payment.

If an immediate legacy is given without specifying a time for payment, and is given over in case the legatee dies before it becomes payable, the word "payable" can only have reference to the death of the testator. (*f*) And even where a legacy (whether immediate or after a prior life estate) is directed to be *paid at a particular age, as twenty-one, and is given over in case the legatee dies before it becomes "payable," the gift over takes effect if the legatee dies before the testator, although he may have attained the age. The legacy has not become payable in fact, and the only effect of holding "payable" in this case to mean "attain twenty-one" would be to cause a lapse. (*g*) The legatee must survive both events, the time appointed for payment (*h*) as well as the death of the testator.

Where time fixed but legatee predeceases testator.

"Entitled in possession," &c.

Although the very word "payable" is the most apt to connect itself with a previous direction to "pay," a similar construction has obtained in cases where the gift over was on death before becoming "entitled in possession," (*i*) or "entitled to the payment," (*k*) or "to the receipt," (*l*) or before the legacy is "received"—read "receivable." (*m*)

"Gift over on death before vesting" of immediate legacy.

The proper legal meaning of the word "vested" is vested in point of interest. (*n*) But its natural and etymological meaning is said to be vested in possession; (*o*) and there are many cases of gifts over on the death of the legatee before his legacy has become "vested," where upon the context

(*f*) Cort *v.* Winder, 1 Coll. 320. See also Whitman *v.* Aitken, L. R., 2 Eq. 414.

(*g*) Walker *v.* Main, 1 J. & W. 1, as explained *ante* p. *792, n. (*e*); In re Gaitskell's Trust, L. R., 15 Eq. 386 (direction to vest at twenty-one, with gift over on death before attaining a vested interest.)

(*h*) Jenkins *v.* Jenkins, Belt Supp. Ves. 264.

(*i*) In re Yates' Trust, 21 L. J., Ch. 281, 16 Jur. 78.

(*k*) In re Williams, 12 Beav. 317 (settlement.)

(*l*) Hayward *v.* James, 28 Beav. 523.

(*m*) West *v.* Miller, L. R., 6 Eq. 59. As to reading "received" as "receivable," see *post* p. *812.

(*n*) Richardson *v.* Power, 19 C. B. (N. S.) 780.

(*o*) Young *v.* Robertson, 4 Macq. 314, 8 Jur. (N. S.) 825.]

the word has been held to bear the latter sense.[19] Thus where an immediate legacy, vested at the testator's death, with a direction for payment at twenty-one, was followed by a gift over in case the legatee should die before it became *vested as aforesaid*, this was held to mean die before twenty-one. (*p*)

—of legacy possession of which is deferred.

So where a vested remainder to children was followed—in one case by a gift over "if any die *before or after me* and before their shares become *vested* interests" (*q*)—and in another by distinct gifts over, "if any die *before me*" leaving issue, and, if any die "before their shares become *vested*" leaving no issue (*r*) —in both these cases "vested" was held to mean vest in possession by the death of the tenant for life. A similar decision was made where the remainder was to and among several, and "if any die without leaving issue before his share vests in him then to be equally *divided among the *survivors*," "survivors" *per se* being considered to be referable to the death of the tenant for life: (*s*) and again where a remainder to children was followed by a gift over, if all died before attaining a *vested* interest, to the *then* next of kin of the testator and the *then* next of kin of his wife *the tenant for life*. (*t*)

The simple case, unaffected by context, of a gift, vested in interest at the testator's death, but postponed in point of possession, does not appear to have presented itself for interpretation. And it seems doubtful whether, in a divesting clause, a departure from the proper technical sense would be justified merely because that sense imputes to the testator an intention to provide only for death in his own lifetime, and to do so, not by the obvious and simple words "die before me," but by "a circumlocution which is at least of ambiguous import." (*u*)

In Parkin *v.* Hodgkinson, (*x*) a testator, after giving a house and an annuity to his sister for life, gave the residue of his real and personal estate to his nephews A, B, and C, the children of his deceased brother, their heirs, executors, &c., as tenants in common, "with cross-remainders between them as to my real estate and with benefit of sur-

19. Burrill's Law Dic., vol. II., p. 586, tit. "Vest;" 4 Kent 202, 238, 245; 2 Bl. Com. 513. See also *ante* vol. II., p. 417, n. 6. and cases there cited.

[(*p*) Sillick *v.* Booth, 1 Y. & C. C. C. 121.

(*q*) King *v.* Cullen, 2 De G. & S. 252.

(*r*) In re Morris, 26 L. J., Ch. 688.

(*s*) Young *v.* Robertson, 4 Macq. 314, 8 Jur. (N. S.) 825.

(*t*) Greenhalgh *v.* Bates, L. R., 2 P. & D. 47.

(*u*) See Lord Cranworth's remarks on this circumlocution, Young *v.* Robertson, *sup.*

(*x*) 15 Sim. 293.

vivorship as to my personal estate in case any of them should die before their shares in the trust property should become vested in them respectively, which I desire may not be shared till the decease of my said sister and my youngest nephew arrive at twenty-four." The only question was whether the gift to the nephews (one of whom was still an infant) was originally vested, or, as contended by the next of kin, wholly contingent until the time appointed for sharing. Sir L. Shadwell, V. C., said, "There is first of all an absolute gift to the nephews, their heirs, executors, &c., as tenants in common. Then comes the clause 'with cross-remainders * * * vested in them.' It seems to me that that clause is wholly void. If any meaning is to be attributed to it, it is, 'if any of them shall die in my lifetime.' Then follows the clause 'which I desire may not be shared,' &c. That is a direction solely as to the sharing, and not as to the vesting of the property. Declare that on the testator's decease his residuary real and personal estate vested absolutely in his nephews."

The next of kin could of course take nothing under a *divesting* *clause in favor of survivors. The nephews, who alone were interested in the construction of the clause, did not raise the question, and the suggestion of the V. C. that "vested" referred to the death of the testator was extra-judicial, though probably warranted by the particular mode in which it stood contrasted with "sharing."

Construction of gift over on death before "vesting" of two estates differently devised.

In Richardson *v.* Power, (*y*) where two estates were differently devised; one to H. and her issue successively, with remainder to A in fee; the other to trustees until A should attain twenty-five, and then to him in fee; and it was declared that if A should die without issue living at his death and before the said several estates should become vested in him by virtue of the limitations aforesaid they should go over to such of the testator's daughters as should then be living. A survived the testator and died before H. without leaving issue living at his death. It was held that "vested" must be construed in "its usually received and recognized technical sense," and that the gift over of the *former* of the two estates failed. Here were two estates, it was observed, one of them so devised that it might be doubted (*z*) whether it vested in A before he attained twenty-five, and although to make a

(*y*) 19 C. B. (N. S.) 780, in Ex. Ch.; see also In re Arnold, 33 Beav. 163, 172.

(*z*) *Semb.*, doubted by the testator: the court seemed not to doubt that it was vested, according to the rule in Boraston's Case, 3 Rep. 19, *ante* vol. I., p. *805.

gift over of the other estate alone it would have been simpler to say "before my death," it would not have been so, if the testator had intended the gift over to take effect as to some of the estates comprised in it on A dying before himself, but as to others (*a*) on his dying before twenty-five.

Death before "entitled."

Held to refer to the interest.

The word "entitled," like "vested," points *prima facie* to the right, and not to the possession. But it appears to have no technical meaning, and in most cases will depend on the context for its effect. In a case, (*b*) where a testator appointed that certain property, representing a settled fund in which his wife had a life estate, should immediately after her death go to his younger sons in certain shares, and if any of them should die before being entitled thereto their shares should go to the survivors in equal shares, it was held by Sir E. Sugden that the only event provided for was death in the testator's lifetime. This decision was reluctantly followed by Sir K. Bruce, V. C., (*c*) in a case *where the gift was to one for life, and after her death to several, as their own proper goods from thenceforth and forever, share and share alike, and if any of them should die before they became entitled to their shares, such shares to go to their issue. "But for the cases cited," said the V. C., "I should probably have decided otherwise." It is to be observed that Sir E. Sugden's decision was based on Doe *v.* Prigg, (*d*) and the doctrine there maintained, that in a gift to survivors after a previous life estate "survivors" *prima facie* meant those who were living at the death of the testator. But now the rule is, that such a gift provides for death happening in the lifetime of the tenant for life, which *pari ratione* should in a case like that before Sir E. Sugden lead to a corresponding construction of the word "entitled."

On the other hand, in Turner *v.* Gosset, (*e*) where the bequest was

(*a*) *I. e.*, if those others should turn out not to be vested till twenty-five, *semb.*

(*b*) Commissioners of Charitable Donations *v.* Cotter, 2 D. & Wal. 615, 1 D. & War. 498.

(*c*) Henderson *v.* Kennicot, 2 De G. & S. 492. Besides Sir E. Sugden's decision, Fry *v.* Lord Sherborne, 3 Sim. 243, was cited. But that was the case of a settlement, where it was held that, on attaining twenty-one, daughters became absolutely entitled to portions, which were expressly made payable at that age, or within six months after the death of their father, tenant for life of the lands charged, (whichever event should last happen,) notwithstanding a direction that if the daughters should die before their portions were *payable* they should not be raised.

(*d*) 8 B. & Cr. 231, *ante* pp. *727, *736.

(*e*) 34 Beav. 593.

Held to refer to the possession.

to several and to their children after them, and if they should leave no children (which happened) then an equal share to be paid to each of four named persons, and "in case of the death of either of them before they should severally become entitled to the said share" it was given to the children or other issue of such of them as should be then dead leaving issue *per stirpes*. Sir J. Romilly, M. R., held that this meant "become entitled in possession."

And if the legacy vests at birth in persons who must necessarily be born after the testator's death, the sense of entitled in interest is almost necessarily excluded, since they cannot die before becoming so entitled. (*f*)

Gift over on death before "receiving;"

Executory gifts over in the event of legatees dying before "receiving" their legacies have given rise to much litigation. Actual receipt may be delayed by so many different causes that the court is unwilling to impute to the testator an intention to make that a condition of the legacy, and thus indefinitely postpone the absolute vesting of it. If, therefore, the will points out a definite time when the right to receive the legacy accrues, either expressly, as by directing payment at a particular *age or time, (*g*) or by implication from the dispositions of the will, as upon the determination of a prior life estate, (*h*) the gift over will be referred to that time. And if there is a direction to pay at a specified time, as well as a prior life estate, the case falls within the decisions already noticed respecting gifts over on death before the legacy is "payable."

—construed receivable when the will points out a time for payment.

Thus in Rammell *v.* Gillow, (*i*) where a testator bequeathed his property to trustees in trust to sell, to invest the proceeds, and to pay an annuity of £200 to his wife during widowhood; and as to the residue during her life, and after her decease as to the whole, in trust to pay and divide the same equally amongst his children born or to be born as well sons as daughters as and when they should respectively

(*f*) See Jopp *v.* Wood, 2 D., J. & S. 323, (settlement,) where note that there was only one gift over of the whole fund in the event (which did not happen) of all the legatees dying before becoming entitled.

(*g*) Whiting *v.* Force, 2 Beav. 573.

(*h*) In re Dodgson's Trust, 1 Drew. 440. In Girdlestone *v.* Creed, 10 Hare 487, a gift of "what I have received from the estate of A" was held to pass property so derived though not received.

(*i*) 15 L. J., Ch. 35, 9 Jur. 704.

attain twenty-one; but in regard to such of his children as had already attained that age he directed their shares to be paid to them at the expiration of twelve months after his wife's decease, or so soon after as the trustees should have assets in their hands; but, in the event of the decease of any of his said children, sons or daughters, before they should have *received or become possessed* of their divisional share aforesaid leaving issue, their share was to go to their children. Three of the sons (the plaintiffs) had attained twenty one at the date of the will. The widow was still living. Sir James Wigram, V. C., said, "If the widow had taken a life interest in the whole, and if the clause which relates to the children who had already attained twenty-one had directed that all the children should not receive what was given to them until the expiration of twelve months after the death of the widow, there would, I think, have been a very plausible ground for contending that the payment being postponed merely for the convenience of the life estate of the parent, the case ought to be dealt with as in the cases referred to by the plaintiffs. (*k*) If, on the other hand, no part had been given to the widow, it appears to be impossible without direct violence to the language of the will, and without any reason for violating it, that the court should put a different construction on it from that which it naturally bears." Here part was given to the widow for life, and part not; and the V. C. thought in a case in which it was impossible to say what the testator had in his *contemplation, the reasoning that would apply to the part that was given to the widow for life could not be transferred to the rest. As to the shares of the plaintiffs, therefore, he held that they could not be dealt with as in the cases referred to, but would go over if the legatees died before "receiving" their shares. "What that means," he added, "I need not decide." * * * "If the widow were to die, and at the end of a year one of them had not received anything, and that child was to die, I do not mean to say that that share would go over merely because it had not been actually received." As to children who had attained twenty-one since the date of the will, (to whom, it will be observed, as well as to the plaintiffs, the gift over applied,) he held that they took vested interests not liable to be divested.

If no such period is indicated by the particular will it becomes a ques-

(*k*) Viz., Schenck *v.* Legh, &c., *ante* p. Miller, L. R., 6 Eq. 59.
*799, n. (*e*). See accordingly West *v.*

When referred to end of one year after testator's death.

tion whether there is not some time at which according to the general law regulating the subject the gift may properly be said to be receivable and to which the testator may fairly be supposed to refer. Thus in In re Arrowsmith's Trusts, (*l*) where a testator gave his money out on security that should be due to him at his decease in trust to be paid and divided unto and between his nephews and nieces who should be then living, with a gift over, in case any of them should die "before receiving their respective shares," to the surviving nephews and nieces; it was held by Sir R. Kindersley, V. C., that "die before receiving" meant die within one year after the testator's death, that being the period which is generally allowed to executors for the getting in and distribution of their testator's estates, and at the end of which the shares might be said to be receivable. The words could not be construed "die before the testator" because the original gift was expressly to persons living at the testator's death, and that construction would render the gift over inoperative. This gave an indefeasible interest to all but one niece, who alone died within the year. On appeal, K. Bruce and Turner, L. JJ., agreed with the rest of the decision, but as to the share of the deceased niece, a decision having become unnecessary, Sir K. Bruce would not give any opinion, and Sir G. Turner said he was disposed to think an inquiry ought to have been directed whether *any part* of the fund was received, or could properly, having regard to the state of the assets, have *been paid over *within the year*. The executors, according to general rules, (he said,) might have paid it, but the V. C.'s decision, that the gift over would take effect on death within the year, would prevent their making any payment within that period. * * * "There are two periods to which the words may refer, the period when the fund was actually got in, or the period when it could have been paid over to the legatees. To refer them to the former period would be a most inconvenient construction." He therefore preferred the inquiry.

Whether court may inquire whether receipt within the year was possible.

Again, in In re Collison, (*m*) where a testator gave real and personal estate to trustees in trust to sell and out of the proceeds to pay debts and an annuity and to set apart a fund for the latter, and subject thereto to divide the residue into six parts unto and among his six

(*l*) 29 L. J., Ch. 774, 30 Id. 148, 6 Jur. (N. S.) 1232, 7 Id. 9, 2 D., F. & J. 474.

(*m*) 12 Ch. D. 834.

nephews and nieces, (named,) the shares of nephews to be paid as soon as practicable, the shares of nieces to be invested and the income paid for their separate use; in case any of his nephews should *die before him or before the division of his estate* their shares to go to their children, if any, if no children then to the remaining legatees; there was a similar gift over of the shares of nieces. A niece died unmarried within one year after the testator's death; Sir E. Fry, J., adopted Sir R. Kindersley's reasoning in In re Arrowsmith's Trusts, and held that the reasonable and convenient interpretation of "division" was the year allowed by law for division. It was argued that the deceased niece was at all events entitled to her share of what *might* have been paid before her death. But the judge said that though there was some authority for directing an inquiry when a division might have been made, "the decision in Hutcheon *v.* Mannington (*n*) proceeded on the extreme difficulty of deciding whether a thing might or might not have been done. I should (he added) be directing an inquiry of the description which Lord Thurlow rejected in that case, and such as the House of Lords in Miners *v.* Battison (*o*) held ought not to be directed. Moreover, * * * it must rest with those who say that a division ought to have been made earlier (than the end of the year) to adduce evidence that it could. So far as the evidence goes in the present case it shows the contrary. * * * On that ground, *independently of any other*, I should reject the presumption that the estate could have been divided at an earlier period."

Inquiry rejected.

Of the two cases here referred to, Minors *v.* Battison will be *stated presently, and will (it is submitted) be found not directly to raise the point here in question. But Hutcheon *v.* Mannington (*p*) is both an illustration of the extreme reluctance of the court to read a gift over on death before "receiving" as referring to actual receipt, and an important authority on the propriety of directing an inquiry whether the legacy could or could not have been received before the death of the legatee.

In that case a testator, after reciting that his fortune, consisting of £8627, was all vested in Indian securities, gave several legacies, and annexed to each a gift over if the legatee should die before he "may have received" it. Then,

Hutcheon *v.* Mannington.

Inquiry what *might* have

(*n*) 1 Ves., Jr., 366.
(*o*) 1 App. Cas. 428.
(*p*) 1 Ves., Jr., 362, 6 Id. 536, and see the judgment more shortly and in some respects differently stated, 4 B. C. C. 491 n.

been received, rejected as impracticable.

after calculating the amount of the residue, he gave it to his father, "but in case of his death before he may have received the rest and residue of my estate before mentioned" then over. The father survived the testator some three years, and died without having received any part of the residue. For the plaintiffs, claiming under the gift over, it was argued that the testator, having express regard to the situation of his property, intended it to go over if the legatee did not live to receive it; that if real estate were given in trust to sell with all possible diligence, the court would inquire into that; so here there ought to be an inquiry within what time he might have received it; the plaintiffs insisting that the estate could not have been got in before his death. Lord Thurlow said: "Suppose any of these legatees had died within a year after the testator, there might have been some ground for saying that the testator alluded to the known practice of the court to compute interest on legacies from a year after the death of the testator. I rather believe he had some such purpose as you attribute to him in his contemplation. There is a faint indication of a purpose that there shall be some time or other when these interests shall go over, and that they shall not vest in the meantime. But has he conceived that intention and expressed it with such definite certainty that I can act upon it? I am to compute what time would be sufficient to enable these parties to receive their legacies. It is all too uncertain. * * * Suppose he had given a real estate in the manner you specify; it is clear that it will neither depend on the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness; in some way it may be sold immediately; but I should not inquire when a real *estate might have been sold with all possible diligence, for it might be the very next day or that very evening, and, therefore, the court always in such a case considers it as sold the moment the testator is dead; for where there is a trust, that is always considered here as done which is ordered to be done, and the court cannot measure the time. Suppose this property had been in the West Indies instead of the East, it would have taken less time to be remitted; still less if in Jersey or Cumberland; and if only 100 miles off it would have cost a journey of two days at least. In this case it is an immeasurable purpose. I can do nothing with it; and it must be considered as vested from the death of the testator."

Of Lord Thurlow's construction of the words "may have received,"

Lord Eldon (who was the plaintiff's counsel in the case) repeatedly expressed his disapproval. On one occasion he said, "The natural construction was, if the legatee should die before the property should be actually remitted to him. But Lord Thurlow thought himself at liberty to put a construction upon the will that might by possibility be put upon it, supposing an intention that there should be an inquiry as to each and every part when it might be said that it could have been received." (q) And on another occasion he said he thought the construction was "too bold;" and that Lord Thurlow "thought there was an indication of a purpose such as was contended for by the plaintiff, but that it was impossible to inquire when each and every part of the estate could have been received, collected and got in." (r)

Lord Eldon's observations on Hutcheon v. Mannington. 1st, as to the construction;

As to the decision that it was impossible to inquire when the legacy might have been received, Lord Eldon said, (s) "Whatever may be the difficulty of construing the expressions in Hutcheon v. Mannington, whenever a testator directs his trustees to mortgage, sell, or convert his estate into money, this principle is clear, that no fraudulent or unnecessary dilatory dealing by trustees shall affect third persons. The duty of the court would require them to discuss as a matter of fact that loose expression 'what they might have received.'"

—2d, as to the inquiry.

And in Law v. Thompson, (t) where the gift over annexed to a simple legacy was in case of the legatee's death "before the said sum be paid into his hands," and the executors having *renounced, great delay occurred in remitting the assets from India, so that the legatee died before payment; Sir J. Leach, M. R., held that though this meant actual payment, the rights of the legatee could not be defeated by the accidental circumstances of the case, and therefore he directed an inquiry whether, if the will had been proved by the executors, and reasonable diligence had been used by them, any and what part of the testator's property given to the legatee could have been remitted to him in his lifetime.

An inquiry extending over the lifetime of the legatee appears to differ from an inquiry limited to one year (such as was advocated by Sir G. Turner) only in the amount of labor involved.

(q) 11 Ves. 497.
(r) 6 Ves. 536.
(s) Gaskell v. Harman, 11 Ves. 507; and see the inquiry directed in that case.
(t) 4 Russ. 92.

Is a gift over on death without actually receiving, valid?

Early opinions, *pro.*

Hitherto, it has been assumed that if the testator clearly intends the legacy to be divested unless actually received by the legatee, such intention will prevail. Such was clearly the opinion of Lord Eldon, Sir W. Grant and Sir J. Leach. Lord Eldon, in an often-cited judgment, (*u*) says, "I admit the soundness of the proposition, that if a testator thinks proper, whether prudently or not, to say distinctly, showing a manifest intention that his legatees, pecuniary *or residuary*, shall not have the legacies or the residue unless they live to receive them in hard money, there is no rule against such intention if clearly expressed. But that would open to so much inconvenience and fraud that the court is not in the habit of making conjectures in favor of such an intention. In Hutcheon *v.* Mannington, I admit I thought the meaning of those words was, what they shall have received; and I thought so even after the decision. The use I have since made of that case is as an authority that if the words will admit of not imputing to the testator such an intention, it shall not be imputed to him." And Sir W. Grant said, (*x*) that Lord Thurlow proceeded on the ground "that he was called upon to determine, not whether any particular event had or not happened before the death, but whether an event might by possibility have happened." That is to say, Lord Thurlow held the words to mean something that he thought was void, rather than hold them to mean something so inconvenient (because valid) as "die before he shall have received." 20

Martin *v.* Martin, *contra.*

But Hutcheon *v.* Mannington has been cited in recent times as deciding that a gift over, if the legatee dies without actually receiving his legacy, is vold. Thus, in Martin *v.* Martin, (*y*) *where a testator gave his property to be equally divided among his nephews and neices, and if any of them should die before him or before they should have actually received what was to go to them under the will, their share to go over; it was held by Sir W. P. Wood, V. C., that the gift over was void. He said, "It is a common impression on testators' minds that the event may occur of death before actual receipt of property given. The law has interfered on account of the extreme difficulty of meeting such a wish. In

(*u*) In Gaskell *v.* Harman, 11 Ves. 497.

(*x*) 8 Ves. 555.]

(20) See *ante* vol. II., p. 761, n. 26, and cases there cited.

[(*y*) L. R., 2 Eq. 403; see also In re Kirkbride's Trusts, Id. 400.

Hutcheon *v.* Mannington Lord Thurlow uses the expression, 'It is an immeasurable purpose.'"

But, as already noticed, Lord Eldon dissented from the construction adopted in Hutcheon *v.* Mannington, precisely because the words there used were held *not* to mean "before actually receiving." And no doubt of the validity of a divesting clause depending on actual receipt was suggested in Whitman *v.* Aitken, (z) where to a simple legacy was annexed a gift over if the legatee should die before the legacy was actually paid or payable to him. The legatee died a few months after the testator, and effect was given to the gift over by Sir J. Stewart, V. C., who construed the clause as providing for two events—death in his own lifetime, which would be before the legacy was payable, and death after his own decease without having been actually paid.

The gift over upheld in Whitman *v.* Aitken.

However, in Minors *v.* Battison, (a) Lord Thurlow's decision was again referred to as denying the validity of a gift over on death without actually receiving. Minors *v.* Battison did not directly raise this point; but it is a case which requires consideration:—a testator gave his real and personal property to trustees in trust for his wife for life, after whose death there was a provision (whether a trust or only a discretionary power was the principal question in the case) for sale of the property and for division of the proceeds among the testator's children; and if any child should *survive the wife* and die before he or she should have *received* his or her share, such share was given over. The eldest son survived the wife more than a year, but died before any sale was made, and the question was whether his share was divested by the gift over. Sir C. Hall, V. C., held that it was not, being of opinion that it was a trust and not a power; and he declared that *for the purposes of distribution* *the estate ought to be considered as sold and converted at the expiration of twelve months from the death of the testator's widow. This was reversed by the L. JJ., who held that there was no trust, but only a power to sell at the absolute discretion of the trustees. They, as well as the V. C., construed "received" as *de jure* receivable; but held that the shares did not become *de jure* receivable until the trustees chose to sell: the exercise of their discretion as to any part fixed

Minors *v.* Battison.

(z) L. R., 2 Eq. 414.

(a) 1 App. Cas. 428. The statement in the text, except of the gift over, is much abridged. The opinions of the V. C. and of the L. JJ. are to be collected at pp. 432, 436, 438, 446, 447, 453.

the time as to that part. But the original decision was restored in D. P.

Lord Selborne's observations in Minors v. Battison.

Now, as it was not contended that actual receipt was meant, the validity of a divesting clause which does was not in question. (b) But Lord Selborne made some observations on that question. Referring to the clause in that case, he said, "These words, in their natural sense (from which there is nothing in the context to authorize any departure,) relate to the death of a child during the interval between the death of the widow and the time when that child's share might be actually received, or at least *de jure* receivable. It was decided in Hutcheon v. Mannington, and Martin v. Martin, that such a divesting clause, if it refers to the time of actual receipt, is too uncertain and indefinite to be capable of being carried into effect. Lord Thurlow said, in the former of these cases, that it would be contrary to common sense to make the divesting of a vested interest depend upon the caprice or upon the dilatoriness of the trustee to sell; (c) that in some way the property might be sold immediately * * * that where there is a trust, that is always considered in equity as done which is ordered to be done, and that the court cannot measure the time."

Effect where part has been received and part not.

But besides this Lord Selborne held that there the divesting *clause failed, on the ground that what was given over was "such share," spoken of as a whole, and the testator had not, with sufficient clearness for a divesting clause,

(b) For the same reason the propriety of a general inquiry whether a legacy might or might not have been received did not come in question. An inquiry whether the share of the deceased son might have been received within the year was immaterial, since he outlived the year. No inquiry of either kind was asked for by either side. But in In re Collison, *sup.* p. *815, Sir E. Fry cited Lord Selborne's statement of what Lord Thurlow said, and added, "If that be so, it follows that I must reject the actual time of division of a part or of the whole of the estate, and, if I must reject the time of the actual division as too uncertain, the time when any part of the estate *might* have been divided is *a fortiori* too uncertain." Thus only through Lord Selborne's observations and only by inference from them has Minors v. Battison any bearing on the question of an inquiry.

(c) There is here an important variation from Lord Thurlow's real words, making it appear that he thought a divesting clause to take effect on death before actual receipt could properly be rejected on the ground that it would make the rights of legatees depend on the caprice of the trustee. Even with regard to a trust for sale, what he did say, though generally true, is not universally so; for the testator may have intended that those rights should depend on the actual sale, per Grant, M. R., 8 Ves. 556.

declared what was to go over in the event which had happened of part having been received or become receivable (which latter it was conceded satisfied the clause) and of part not having been received, or (according to the L. JJ.) become receivable. In his opinion the estate became *de jure* distributable at the time of the widow's death, and "on this one point he differed from the decision of the V. C." To meet this view the order was varied, and it was declared that in the events which happened the deceased son took an absolute vested interest in a share of the estate, "the whole being considered as converted into money and distributable *immediately* upon the death of the widow."

Order in Minors v. Battison.

This variation, though not material to the decision of the case, would seem to be very material in principle; for it annihilates the interval clearly contemplated in the divesting clause between the death of the widow and the time of "receipt," and thus appears to adopt (perhaps under the circumstances without much consideration,) the opinion that the clause, whether it meant received or receivable, was entirely void, though for which of the reasons given by Lord Selborne does not appear.

The general question of the validity of such a clause was fully discussed in Johnson *v.* Crook, (*d*) where residue was bequeathed equally between A and B; "but if A shall die before he shall actually have received the whole of his share, and without leaving issue, then, and whether the same shall have become payable or not, his share, *or such part* or parts thereof as he shall *not have actually received* as aforesaid shall be paid to the said B." A survived the testatrix some seven years, and died without receiving any part of the residue, and without leaving issue. Sir G. Jessel, M. R., held that the intention to use the words "actually received," in their literal sense, was placed beyond doubt by the addition of the words "whether payable or not;" that the latter words provided for non-receipt from any cause whatever, including fraud, accident or mistake; that there was no uncertainty or difficulty in ascertaining whether the event had happened; and that the gift over had taken effect. He examined the cases, and arrived at the conclusion that Martin *v.* Martin was the first in which such a gift over was held void; that it was so decided simply *per incuriam;* and that although *some of Lord Selborne's expressions in Minors *v.* Batti-

Gift over of the legacy, or of the unreceived part upheld.

(*d*) 12 Ch. D. 639.

son were difficult to deal with, the point did not directly arise in that case.

Similar gift over held void.

On the other hand, in Bubb *v.* Padwick, (*e*) where residue was given in trust for all the testator's children who should attain twenty-one or (being daughters) marry, as tenants in common, but children so attaining vested interests were not to be entitled to receive their shares until his youngest child should have attained twenty-one, but the trustees were empowered to pay the share of each child as soon after he or she had attained such vested interest as the trustees thought proper; and in case any child should die before the youngest for the time being had attained twenty-one *without having actually received* the whole of his or her share, then *so much of the share*, original and accruing, of the child so dying as should not have been received by him or her was given over to the other children who should be living when the youngest attained twenty-one. Sir R. Malins, V. C., decided that each child on attaining twenty-one or (if a daughter) marrying acquired an indefeasible interest. He said, "This principle has been acted upon for ninety years—certainly from the time of the decision in Hutcheon *v.* Mannington—that where there is a gift of property with a gift over if the legatee dies without receiving it, the gift over is too vague and indefinite; it is simply regarded as void, and the original gift remains."

Gift over of "the share" of a legatee dying "before the execution of the trusts."

In Roberts *v.* Youle, (*f*) a testator gave his real and personal property to trustees for sale, with authority to postpone the sale, and in trust to divide the proceeds among his three sons and his daughter (naming them), but directed the trustees to retain his daughter's share on certain trusts for her and her issue; "and in the event of any of his said children dying *before his* (testator's) *decease or the execution of all or any of the trusts* of the will leaving issue, he directed the trustees to pay to the issue of such deceased child or children the share or respective shares, his, her or their respective parents would have taken and been entitled to if living, share and share alike." It was held by Sir C. Hall, V. C., that the gift over was so ill-constructed, and (particularly with regard to the daughter's share) so embarrassing that he could not give effect to it. He considered it unnecessary to say whether he agreed with Johnson *v.* Crook: he distinguished that case on the ground that

(*e*) 13 Ch. D. 517.

(*f*) 49 L. J., Ch. 744, W. N. 1880, p. 136.

what was there given over was not the *whole share, but such part or parts thereof as should not have been received.

The last case is too special to have much effect on the general question. In Bubb *v.* Padwick, too, the will was peculiar, the intention being express that the shares should be vested in interest, *i. e.*, transmissible, (*g*) though payment was postponed, yet that they should be divested, *i. e.*, not be transmissible, unless actually paid; which is contradictory. The court, however, relied on no such special ground.

With regard to the distinction which depends on the words specially referring to an unreceived part—to hold that, unless there are such words, the gift over will not carry such part, where other part has been received, and still more, that unless there are such words the gift over is void *ab initio*, would seem to push to an extreme point the doctrine that a clear vested gift is not to be cut down by subsequent ambiguous expressions.

There is, however, another distinction between Crook *v.* Johnson and the other cases, viz., that the testator had shown that he intended the legatee to take the risk of the non-receipt being caused by the misconduct of the trustee. Where this is not shown, the further question, whether the court can inquire into the possibility of an earlier receipt —an inquiry which is needed to protect the legatee from misconduct in the trustee—must, it should seem (having regard to Lord Eldon's opinion that such misconduct shall not affect third persons), enter largely into the consideration of the main question, whether the clause is itself valid. In this way Hutcheon *v.* Mannington would have a material bearing on that question, and the court would have to decide whether in ordinary cases it would follow that authority or the opinion of Lord Eldon, Sir J. Leach and Sir G. Turner.

Gift over if A dies without *leaving* children, objects of prior vested gift, read without *having*.

It has been noticed in a former chapter (*h*) that where a legacy is given to one for life, and after his death to his children, with a gift over if the tenant for life dies without *leaving* children, the gift over is sometimes construed as meaning in default of objects of the prior gift, or, as it is commonly expressed, "leaving" is construed "having." 21

(*g*) This, no doubt, is not generally the sole effect of vesting; it also gives the intermediate income: but here the income was expressly disposed of.

(*h*) *Ante* p. *200.]

21. See *ante* vol. II., p. 761, n. 26, and cases there cited.

Besides the favor always shown to provisions for children, it requires very strong words to defeat a prior vested gift. (*i*) Thus, in Maitland *v.* Chalie, (*k*) where a *testator bequeathed a sum of money in trust for his daughter S. for life, and after her death, as to a moiety thereof, for her children equally to be divided between them at their respective ages of twenty-one, and if but one, then to that one at twenty-one, with maintenance during minority; and if any of such children should die before attaining twenty-one, his share to go to the survivors; but in case S. should die without *leaving* any child or children, or leaving such and they should die before attaining twenty-one, then to testator's next of kin living at the death of the longer liver of them, his said daughter and her children so dying under age. S. had issue two daughters who attained twenty-one, but died in their mother's lifetime. Sir J. Leach, V. C., said, "A clear vested gift is in the first place given to the children of a daughter attaining twenty-one. If in the clause which gives the property over on failure of her children, the word 'having' be read for 'leaving,' the whole will will express a consistent intention to that effect. I feel myself bound by the authorities to adopt this construction." Then, citing Woodcock *v.* Duke of Dorset, and Powis *v.* Burdett, (*m*) he declared that the two daughters having attained twenty-one took vested interests.

In these remarks "vested" is apparently used in the sense of "indefeasible." At all events the appointment of a specified time for vesting, though it may strengthen the case, (*n*) is not necessary. A simple gift in remainder to children (which by operation of law vests in them at birth) is enough to attract the rule. Thus, in Treharne *v.* Layton, (*o*) where a testatrix gave all her real and personal estate to her granddaughter M. for life, and after the death of M. to her children in equal parts; and she ordered M., to make a weekly allowance to R. during his life. "In case my granddaughter M. dies *leaving no issue*, the whole of the property goes to the next of kin," they making the same allowance to R. during his life. It was held that "leaving" must be construed "having had," and that the real estate

[(*i*) 8 Jur. 14.

(*k*) 6 Mad. 243. See also Cassamajor *v.* Strode, 8 Jur. 14; In re Thompson's Trust, 5 De G. & S. 667; Kennedy *v.* Sedgwick, 3 K. & J. 540; In re Brown's Trust, L. R., 16 Eq. 239; Lord Sondes' Will, 2 Sm. & Gif. 416.

(*m*) *Ante* p. *799, n (*e*).

(*n*) See Gibbons *v.* Langdon, 6 Sim. 260.

(*o*) L. R., 10 Q. B. 459, in Ex. Ch., affirming Q. B.; *ante* p. *495, n. See also White *v.* Hill, L. R., 4 Eq. 265; per Jessel, M. R., In re Jackson's Will, 13 Ch. D. 192; Marshall *v.* Hill, 2 M. & Sel. 608. As to Ex parte Hooper, 1 Drew. 264,

had vested indefeasibly in the only child of M., though he died before her.

*In the last case "issue" in the gift over must have been read "children" by reference to the prior gift. It would otherwise have been difficult to construe the words "die leaving no issue" in any sense but "leaving no issue at her death," according to 1 Vict., c. 26, § 29. (p)

Gift to A. in fee with gift over if he die *without leaving any issue*, "leaving" read "having had."

In White v. Hight, (q) the rule was applied to a case of a different kind. A testator there devised real estate to his daughter S. for life, and after her death to A. the only child of S. "But in case the said A. my granddaughter shall happen to depart this life before the decease of her mother or after her decease *without leaving any issue*, then" to testator's second daughter. A. survived her mother, and having two children born claimed the absolute interest, for that on the authority of the preceding cases "leaving" must be construed "having had." On the other side, it was truly argued that such a construction had never been adopted except to make the limitation over fit into a prior gift. But Sir J. Bacon, V. C., decided in A.'s favor. Referring to Marshall v. Hill, (r) he said: "Lord Ellenborough and Bayley, J., without any kind of hesitation, came to the conclusion *under such circumstances* that you must read 'without leaving' as 'without having had.'" He added, "*If the words had been* 'after her decease without leaving any *children*,' it would certainly have been unreasonable to impute to the testator the meaning that if his granddaughter should have half-a-dozen children, and each of them half-a-dozen children, and all the former should happen to die in their mother's lifetime, none of the latter would get anything. But that would be the result of construing the word 'leaving' literally." 22

As neither children nor grandchildren would, in the case put, get anything, under the will, any more by one construction than by the other, the V. C. could not have here intended to refer to anything to be so got. But neither would children or grandchildren as a class ("half-

vide ante p. *466, n. Cases in which there is no ambiguity in the term used, as, "without leaving issue at the time of her death," (Young v. Turner, 1 B. & S. 550,) or "should all his children die before himself," (Chadwick v. Greenal, 3 Gif. 221,) are scarcely within the rule.

(p) *Ante* p. *495.

(q) 12 Ch. D. 751. The terms of the will are collected partly from the judgment. The head-note is erroneous.

(r) 2 M. & Sel. 608.]

22. See *ante* vol. II., p. 766, n. 27, 28.

a-dozen") have had the chance, if "leaving" were read "having had," of getting anything by succession from A.; since the subject of gift was real estate, descendible to one. In Marshall *v.* Hill, (*s*) the "circumstances" were different, the devise being to J. for life, remainder to his first, second, third, fourth, fifth and sixth sons, and if J. should die, leaving no son or sons as aforesaid, over. There, as in all the *other cases before White *v.* Hight, the gift over was in effect construed as meaning in default of objects of the prior gift. Moreover the word actually used in White *v.* Hight was not "children" but "issue," to which the observations of the court are in no way applicable. The stat. 1 Vict., c. 26, § 29, was not referred to, although, if A. would have been tenant in tail under the old law, (as it seems she would,) (*t*) that enactment would seem to have required that "without leaving issue" should be construed "issue living at the death of A."

"Leaving" not construed "having had" if prior gift to children is contingent.

But "without leaving" in the gift over will not be construed "without having had" if the prior gift is expressly made to depend upon the corresponding contingency of "leaving children." Thus, in Bythesea *v.* Bythesea, (*u*) where a testatrix bequeathed the residue of her personal estate in trust for her grandson for life, and after his decease, "*in case he should leave any child or children*, then in trust for all and every the child and children of her said grandson lawfully begotten, equally between them if more than one, share and share alike, as tenants in common; and if there should be one such child, then in trust for such only child, to be paid and payable to such child or children at his or their age or respective ages of twenty-one years;" and the testatrix declared, "that the part or share of each such child or children should be considered as a vested interest or vested interests in him, her or them respectively;" and there was a gift over after the decease of the grandson, "in case he should not *leave* any such child or children." The grandson had one child only, who attained twenty-one, and died in his lifetime. It was held that the gift over took effect. Lord Cranworth said, "It was contended that the first contingency had in fact happened; for that in this case 'leaving' must be construed as 'having children;' for that the testatrix could not be held to intend that the gift to the children should depend on the accident of *some or one of them* surviving their father. The answer to this is that the

[(*s*) *Ibid.*

(*t*) Feakes *v.* Standley, 24 Beav. 485.

(*u*) 23 L. J., Ch. 1004, affirming Wood, V. C., 17 Jur. 645.

words of the will are clear and unambiguous. It may be impossible to explain why the testatrix should have made such a disposition; but nevertheless she was at liberty to do so." The direction as to vesting was also relied on; but he thought this might apply only to the contingency happening of the grandson leaving a child surviving. Sir G. Turner, L. J., said that the authorities justified him in saying that the cases on set*tlements had been carried as far as they should be, and that the present case, even if it had been one of settlement, was distinguishable, for two reasons: first, that in all the previous cases, there were provisions inconsistent with the notion that the gift was to depend on survivorship, while here the provisions were throughout contingent; secondly, that in all of them the question had arisen between the eldest son and the other children, or between the surviving children and the representatives of deceased children; and in none of the cases that he was aware of had there been a limitation over in favor of third persons. As to the cases in which the question had been, whether a clear vested interest was to be cut down by words importing contingency, he said they had no application to a case where the whole disposition was introduced by words importing contingency.

But if one child survives parent, all will take;

It is plain from Lord Cranworth's observations that, if there had been several children, and only some or one of them had survived the grandson, he would have been of opinion that all the children were entitled, the gift being to all the children generally, upon a contingency (viz., "leaving any child") which would have happened. And this appears to be the rule. (*x*)

—unless excluded by context.

But if after these introductory words the gift itself is to *such* children, it is confined to those who themselves survive their parent. (*y*) So, if the shares are expressly directed to vest at the death of the parent, the only possible question in such a case being whether "vested" is to bear its literal meaning. (*z*) And if the issue of a child who predeceases the parent are expressly provided for, the case is said not to be within the reason of those in which there is no such provision, and in which the court has therefore

(*x*) Boulton *v.* Beard, 3 D., M. & G. 608 (no gift over); M'Lachlan *v.* Taitt, 28 Beav. 407, 2 D., F. & J. 449. Winn *v.* Fenwick, 11 Beav. 438, *contra*, is questioned by Lord St. Leonards, Pow. 596, (8th ed.)

(*y*) Sheffield *v.* Kennett, 27 Beav. 207, 4 De G. & J. 593; In re Watson's Trusts, L. R., 10 Eq. 36. See also In re Heath's Settlement, 23 Beav. 193; Jeyes *v.* Savage, L. R., 10 Ch. 555. Bryden *v.* Willitt, L. R., 7 Eq. 472, has not been followed.

(*z*) Selby *v.* Whittaker, 6 Ch. D. 239.

adopted a particular construction for the purpose of protecting the predeceasing child from loss of his share. (*a*) To give to all the children, if only one survives the parent, but unless one survives to give to none, is not a probable intention, and full weight will be allowed to any indications of an intention to give only to such as themselves survive, (*b*) especially if there is an accumulation of such indications. (*c*)]

(*a*) Per James, L. J., 6 Ch. D. 249.

(*b*) Wilson *v.* Mount, 19 Beav. 292. See also Stevens *v.* Pyle, 30 Beav. 284; Hedges *v.* Harpur, 3 De G. & J. 139.

(*c*) Selby *v.* Whittaker, *sup.*]

*CHAPTER L.

EFFECT OF FAILURE OF A PRIOR GIFT ON AN ULTERIOR EXECUTORY OR SUBSTITUTED GIFT OF THE SAME SUBJECT; ALSO THE CONVERSE CASE.

Effect upon executory gift of failure of prior gift.

Where real or personal estate is given to a person for life, with an ulterior gift to B. as the gift to B is absolutely vested, and takes effect in possession whenever the prior gift ceases or fails, (in whatever manner,) the question discussed in the present chapter cannot arise thereon.

Sometimes, however, an executory gift is made to take effect in defeasance of a prior gift, *i. e.*, to arise on an event which determines the interest of the prior devisee or legatee, and it happens that the prior gift fails *ab initio*, either by reason of its object (if non-existing at the date of the will) never coming into existence, or by reason of such object (if a person *in esse*) dying in the testator's lifetime. It then becomes a question whether the executory gift takes effect, the testator not having in terms provided for the event which has happened, although there cannot be a shadow of doubt that, if asked whether, in case of the prior gift failing altogether for want of an object, he meant the ulterior gift to take effect, his answer would have been in the affirmative.[1] The conclusion that such was the actual

1. In the case of a devise to testator's widow, so long as she remains his widow, and if she marry again, a life estate in one-third of it, followed by a devise in fee to A, he to take possession of two-thirds on her marriage, and the remaining third on her decease, no part of such devise is contingent on the widow's marriage, and she having died without remarrying, A takes the whole, Ferson *v.* Dodge, 23 Pick. 287.

Where the testator bequeathed $1200 to trustees, directing them to purchase with that sum a dwelling-house for his widow, to be used by her for her natural life, and after her death to be sold and the proceeds to be given to A, all the provisions of the will to be upon the condition that the widow accept the same in lieu of dower, the widow's death immediately after the testator, before she had accepted the provision and before the trustees had purchased the house, was held not to prevent the gift to A from taking effect, Am.

intention has been deemed to amount to what the law denominates a necessary implication. Thus, in the well-known case of Jones *v.* Westcomb, (*a*) where a testator bequeathed a term of years to his wife for life, and after her death to the child she was then (*i. e.*, at the making of the will) *enceinte* with; and if such child should die before the age of twenty-one, then one-third part to his wife, and the other two-third parts to other persons. The wife was not *enceinte;* nevertheless Lord Harcourt held that the bequests over took effect; and the court of K. B., (*b*) *on two several occasions (in opposition to a contrary determination of the C. P.,) (*c*) came to a similar conclusion on the same will.

Failure of prior gift held to let in ulterior gift.

So, in Statham *v.* Bell, (*d*) where a testator, reciting that his wife was pregnant, devised that if she brought forth a son, then that he should inherit his estate; but if a daughter, then one moiety to his wife, and the other to his two daughters (he had one daughter then living) at twenty-one. If either died before that time, the survivor to have her sister's share; *if both died before that time,* then both shares to his wife and her heirs. The wife

Bible Soc. *v.* Hebard, 51 Barb. 552, affirmed 41 N. Y. 619, n. So, too, in a like case where the widow waived the provisions of the will and took her dower, Fox *v.* Rumery, 68 Me. 121; Adams *v.* Gillespie, 2 Jones Eq. 244; Firth *v.* Denny, 2 Allen 468; Plympton *v.* Plympton, 6 Id. 178; Woods *v.* Woods, 1 Metc. (Ky.) 516.

Where the prior estate fails on account of devisee's incapacity to take, the limitation over, being made dependent on another contingency which may never happen, cannot be accelerated in advance of such happening, Jackson *v.* Collins, 16 B. Mon. 214, 222. But the incapacity of the first taker does not destroy the remainder, Darcus *v.* Crump, 6 B. Mon. 365.

Where a void accumulation is directed for the life of A, with limitation over on A's death, the latter limitation will take effect immediately, Manice *v.* Manice, 43 N. Y. 303, 383; Leonard *v.* Burr, 18 N. Y. 103. And where there is a gift of residue to A for life, and on her death to her children B and C, and if either "die before their mother without leaving lawful issue living," then the survivor to take the whole, and both A and B die before the testator, the whole vests in C immediately on the testator's death. Bradford, Surr., saying that "the extinction of the first interest carved out of the estate only accelerates the right of the second taker," Taylor *v.* Wendel, 4 Bradf. 324, 331. So, too, Goodall *v.* McLean, 2 Bradf. 309; Downing *v.* Marshall, 23 N. Y. 366.

(*a*) Pre. Ch. 316, 1 Eq. Cas. Ab. 245, pl. 10.

(*b*) Andrews *v.* Fulham, 2 Stra. 1092; Gulliver *v.* Wickett, 1 Wils. 105; [Doe *v.* Challis, 18 Q. B. 224, affirmed in D. P., 7 H. L. Cas. 555, (Evers *v.* Challis.) But the one event cannot be construed as included in the other, where the will elsewhere expressly provides for it, Swayne *v.* Smith, 1 S. & St. 56.]

(*c*) See Roe *v.* Fulham, Willes 303, 311.

(*d*) Cowp. 40.

was not *enceinte;* and the other daughter dying under twenty-one, the wife was held to be entitled to the whole.

It would be immaterial in such case whether the wife had or had not an after-born child subsequent in procreation as well as birth, as such child would not be an object of the gift to the child with which the wife was then *enceinte.* (*e*)

So, in Meadows *v.* Parry, (*f*) where a testator bequeathed the residue of his estate to trustees, upon trust to apply the dividends and interest for the maintenance of all such children as he should happen to leave at his death, and born in due time after, equally, until the age of twenty-one, and then to transfer the funds to them; and in case any of the children should die before twenty-one, such deceased child's share to go to the survivors; and if there should be only one child who should attain that age, upon trust to pay the residue to such child; *and in case all of the children should die before attaining that age,* then he bequeathed the residue to his wife. The testator died without leaving, or ever having had, any issue; but Sir W. Grant, M. R., held that the bequest to the wife took effect.

Gift over, in case there be but one child, extended by implication to event of there not being any.

And, upon the same principle, a bequest over in the event of the prior legatee having but one child has been held to extend by implication to the event of her not having any child. Thus, in Murray *v.* Jones, (*g*) where a testatrix, after bequeathing the residue of her personal property to her daughters and younger sons, provided that in case she should have but one child living at the time of her decease, or in case she should have two or *more sons and no daughter or daughters living at the time of her decease, and all of them but one should depart this life under the age of twenty-one years, or in case she should have two or more daughters and no son or sons living at the time of her decease, and all of them but one should depart this life under twenty-one, and without having been married; or in case she should have both sons and daughters, and all but one, being a son, should die under twenty-one, or being a daughter under that age and unmarried, then she bequeathed the property to another family. The

(*e*) Foster *v.* Cook, 3 B. C. C. 347.

(*f*) 1 Ves. & B. 124. See also Fonnereau *v.* Fonnereau, 3 Atk. 315; Earl of Newburgh *v.* Eyre, 4 Russ. 454, where a question of this nature arose under a special will and was much discussed; [Osborn *v.* Bellman, 2 Gif. 593, where this construction was made on a marriage settlement.]

(*g*) 2 Ves. & B. 313. See also Aiton *v.* Brooks, 7 Sim. 204, *ante* p. *694.

testatrix died without having had a child; but Sir W. Grant, M. R., held that the ulterior gift nevertheless arose; his opinion being, that the case put by the testatrix, namely, that of her having but one child, did not contain a condition that she should have one child living at that time. His reasoning well deserves a particular statement. "At first sight," said the M. R., "a proposition relative to having but one child may seem to include in it and to imply the having one. That is true, if the proposition be affirmative; but by no means so, if the proposition be hypothetical or conditional. The proposition that A has but one child, is as much an assertion that he has one as that he has no more than one; but when the having but one is made the condition on which some particular consequence is to depend, the existence of one is not required for the fulfilment of the condition, unless the consequence be relative to that one supposed child. As, if I say that, in case I have but one child, it shall have a certain portion, it is in the nature of the thing necessary that the child should exist to be entitled to the portion; but if I say that, in case I shall have but one child of my own, I will make a provision for the children of my brother, it is quite clear that my having one child is no part of the condition on which the supposed consequence is to depend. My having one child of my own would be rather an obstacle than an inducement to the making a provision for the children of another person. The case I guard against is the having a plurality of children; and it is only the existence of two or more that can constitute a failure of the condition on which the intended provision of my brother's children was to depend. The plain sense of the proposition is, that unless I have more than one the provision shall be made."

Sir William Grant's reasoning in Murray v. Jones.

Again, in Mackinnon v. Sewell, (h) where the testatrix bequeathed *her residue in trust for her daughter Caroline for life, and after her death for her daughter's daughter, if she should survive her mother and attain twenty-one; but in case she should not survive such mother and attain twenty-one, then in trust for such other child or children of the testatrix's daughter as should be living at their mother's death, to be paid to them after her death as they attained twenty-one; and if all such other children of the testatrix's daughter *should die before attain-*

Gift over extended by implication to event not falling within terms of will.

(h) 5 Sim. 78, [affd. 2 My. & K. 202. Tennant v. Heathfield, 25 Beav. 512.] See also Wilson v. Mount, 2 Beav. 397;

ing twenty-one, then in trust for M. The granddaughter attained twenty-one, but did not survive her mother. Another child of the testatrix's daughter attained twenty-one, but did not survive her mother; afterwards the daughter died. Sir L. Shadwell, V. C., on the authority of the preceding cases, held that the bequest over to M. took effect; his Honor considering that the bequest over, in the event of the children that might survive the mother not attaining the age of twenty-one, was but equivalent to a bequest over in the event of there being no child who should survive the mother and attain twenty-one.

Gift over on prior devisee's refusal to do a certain act. Effect of prior devisee not coming into existence, on gift over if he refuse to do a certain act.

On the principle of the preceding cases, it could not be doubted that an executory gift made to take effect on the prior devisee's neglect or refusal to accept the devise (*i*) or perform some other prescribed act, would take effect, notwithstanding the object of the prior gift never happens to come into existence, such a contingency being implied and virtually contained in the event described. For (to proceed to the second class of cases before referred to), it has been decided that where a testator gives real or personal property to A, and in case of his neglect or failure to perform a prescribed act within a definite period after his (the testator's) decease, then to B, and it happens that the prior devisee or legatee dies *in the testator's lifetime*, the gift over to B takes effect.

Death of prior devisee held to let in ulterior devisee.

Thus, in Avelyn *v.* Ward, (*k*) where a testator devised his real estate to his brother A. and his heirs on this express condition, that he should, within three months after the testator's decease, execute and deliver to his trustee a general release of all demands on his estate; *but if A. should neglect to give such release*, the devise to him to be null and void, and in such case the testator devised to W., his heirs and assigns forever. A. died in the testator's lifetime. Lord Hardwicke held that the gift over took effect; observing that he knew of no case of a remainder or *conditional limitation over of a real estate, whether by way of a particular estate, so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation, *but if the precedent limitation by what means soever is out of the case, the subsequent limitation takes place.*

(*i*) See Scatterwood *v.* Edge, 1 Salk. 229.

(*k*) 1 Ves. 420. See also Doe d. Wells *v.* Scott, 3 M. & Sel. 300, *ante* vol. I., p. *648 and p. *802, n. (*k*); [In re Betts, 30 L. J. Prob. 167.

Prior devise failing under the mortmain act.

[And this doctrine is applicable to the case of a devise to a charity, which is void by law, with a gift over in the event of the inhabitants not appointing a committee or not being willing to carry out the scheme; whether the committee was appointed or not being held to be immaterial. This was decided by Sir. W. P. Wood, V. C., in Warren *v.* Rudall (*l*) in opposition to Att.-Gen. *v.* Hodgson (*m*) and Philpott *v.* St. George's Hospital. (*n*) "I cannot," he said, "see any substantial distinction between the case of a devise over, after a devise to a nonentity, if the nonentity should die under twenty-one, or again, of a devise over, after a devise to a deceased person, if the deceased person should fail to do a certain act, and the case before me of a devise to a charity, which cannot take, followed by a devise over in the event of that charity *which cannot take* omitting to perform a certain act." This decision was affirmed in D. P. Lord Cranworth indeed, though inclined to admit the applicability of the doctrine, relied on the fact that no committee had been appointed, so that the contingency on which the gift over was limited had literally happened. But Lord Campbell and Lord Kingsdown agreed with the more general reasoning of the V. C.] (*n*)

Remarks on Avelyn *v.* Ward.

Lord Hardwicke's observation, however, is not to be taken in too extensive a sense; for it is clear, according to subsequent cases, that if the event upon which the prior gift is made defeasible and the subsequent gift to take effect, is one which may happen as well in the lifetime of the testator as afterwards (in which respect such case obviously stands distinguished from those just stated), and the events which happen are such as would, if the first devisee had survived the testator, have vested the property absolutely in him, the lapse of such prior devise by the death of *the devisee in the testator's lifetime, *though it removes the prior gift out of*

(*l*) 4 K. & J. 603, 9 H. L. Cas. 420 (Hall *v.* Warren.)

(*m*) 15 Sim. 46.

(*n*) 21 Beav. 134.

(*n*) The V. C. retained his opinion, see In re Smith's Trusts, L. R., 1 Eq. 83. In In re Stringer's Estate (6 Ch. D. 1, *ante* p. *15), the foregoing cases were cited as authorities for the position that, where property is given absolutely, with a gift over if the devisee dies without disposing of it, the gift over, which is clearly void for repugnancy, if the devisee survives the testator, is valid if he dies before him. Jessel, M. R., "declined to accede to such a doctrine," and rejected the claim of the devisee over. On appeal, James, L. J., expressed great doubt whether the gift over was not valid in the event which had happened, viz., the lapse of the prior gift. Being valid (if at all) only on this ground, it is clearly not within the authorities here discussed.]

the way, does not let in the substituted or executory devise, which was to take effect on the happening of the alternative or opposite event.

Effect where prior gift fails by lapse.

Thus, in Calthorpe *v.* Gough, (*o*) where a legacy of £10,000 was given to trustees, in trust for Lady Gough for life: and, in case she should die in the lifetime of her husband, as she should appoint; and, in default of appointment, to her children; *but if Lady G. should survive her husband, then for her absolutely.* Lady Gough survived her husband, but died in the lifetime of the testator. The M. R. held the legacy to be lapsed, and that the children were not entitled.

So, in Doo *v.* Brabant (*p*) a legacy was bequeathed in trust for A until she attained twenty-one, and then to transfer it to A, her executors and administrators; and in case A should die *under the age of twenty-one years* leaving any child or children of her body lawfully begotten, then in trust for such child or children; but in case A should die under twenty-one without leaving any child or children, then over. A attained twenty one, and died in the lifetime of the testator, leaving children; [and Lord Thurlow was strongly inclined to decide in their favor but for the case of Calthorpe *v.* Gough. But on a case stated for the Court of K. B., that court certified that the legacy lapsed, and the Lords Commissioners decided accordingly.]

Again, in Williams *v.* Chitty, (*q*) where the testator devised in trust for and to the use of his daughter Sarah, her heirs and assigns; *but in case of her decease under twenty-one and unmarried*, in trust and to the use of his daughter Elizabeth, her heirs and assigns. Sarah died in the lifetime of the testator under age, but having been married. One question was, whether, in the event which had happened, the devise over to Elizabeth was good. Her counsel considered her claim to be so obviously untenable, that he gave up the point; and Lord Loughborough seems to have entertained a similar opinion.

In the three preceding cases, it will be observed, the devise or bequest which lapsed was in favor of a designated individual; *but

(*o*) Cit. 3 B. C. C. 395.

(*p*) 3 B. C. C. 393, 4 T. R., 706; [and see Lomas *v.* Wright, 2 My. & K. 775.]

(*q*) 3 Ves. 549. See also Miller *v.* Faure, 1 Ves. 85; Humberstone *v.* Stanton, 1 Ves. & B. 385; [Williams *v.* Jones, 1 Russ. 517; Underwood *v.* Wing, 4 D., M. & G. 661, 8 H. L. Cas. 183 (Wing *v.* Angrave); Cox *v.* Parker, 25 L. J., Ch. 873, the report of which 22 Beav. 169 omits the important statement that William Michael Parker attained 21; also per Wood, V. C., In re Sanders' Trusts, L. R., 1 Eq. 681.

in the next case (r) we have an example of the application of the principle to a case of more doubtful complexion, the gift being in favor of *a class.*

The devise, in substance, was to A for life, remainder to his children in fee; and, if he should die without leaving issue, then over. A died in the testator's lifetime, leaving a son, who also died in the testor's lifetime: and Sir C. C. Pepys, M. R., held that under these circumstances the devise over failed; observing that it was clear that, if A's son had survived the testator, the devise over could not have taken effect; and it was, he thought, established by authority that the situation of the parties was not altered by the fact of the prior devisee having died before the testator. 2

Remark on Tarbuck v. Tarbuck.

This is an important extension of the doctrine; for, as a devise to a fluctuating class, as children, operates in favor of such of them only as are living at the testator's decease, there might seem to be ground to contend, that, in effect, the case was one in which the failure of the gift was owing to the fact of no object having come into existence rather than to lapse. [The principle of Tarbuck v. Tarbuck was, however, affirmed in Brookman v. Smith, (s) where the devise was to A for life, with remainder to the children of A in fee, and with a gift over "in case every child born or to be born should die under twenty-one:" A had a child living at the date of the will who attained twenty-one, but died before the testator; and it was held that the gift over failed. Some of the judges relied on the expression "*born* or to be born" as necessarily referring to the child then living; but Blackburn, J., doubted whether this was not giving it too much importance; and it is plain that, though there had been no such words, and whatever might have been their opinion if Tarbuck v. Tarbuck had not decided the point, the court would have declined to overrule that case.]

It is presumed, however, that, if the gift had been *in terms* to such

(r) Tarbuck v. Tarbuck, 4 L. J. (N. S.) Ch. 129, stated more fully, *ante* p. *462.]

2. So Brown v. Brown, 1 Dana 43. See also Goodall v. McLean, 2 Bradf. 309; Taylor v. Wendel, 4 Id. 324; Downing v. Marshall, 23 N. Y. 366.

[(s) L. R., 6 Ex. 291, 7 Ex. 271. In Tarbuck v. Tarbuck "leaving" was construed literally; *i. e.*, the failure of children was there as well as in Brookman v. Smith, coupled in precise terms to a period having no reference to the testator's death. Such a case seems not necessarily to govern one where (as in Maitland v. Chalie, &c., *ante* p. *823) "die without leaving children" means simply failure of the preceding gift. See remarks on Doe v. Duesbury, *ante* pp. *464, *465.

children as should be living at the testator's decease, the result would have been different, as the failure of the devise would then clearly have been the consequence, not of lapse merely, *but of the non-happening of the contingency on which the gift was made contingent, and therefore the gift over would take effect. (*t*)

Remark on preceding cases.

It is proper to apprise the reader, that the distinction which has been suggested as reconciling the construction adopted in the last five cases with that which prevailed in Jones *v.* Westcomb and Avelyn *v.* Ward, was not, until Brookman *v.* Smith, adopted or recognized as the ground of decision in those cases. On the contrary, Lord Thurlow in Doo *v.* Brabant treated Calthorpe *v.* Gough as inconsistent with and as overruling the line of cases in question. In support of the writer's suggested distinction, however, it is to be observed that Calthorpe *v.* Gough and Doo *v.* Brabant have been since followed as well in Williams *v.* Chitty, already stated, as in the subsequent case of Humberstone *v.* Stanton, (*u*) without any denial of the authority of Jones *v.* Westcomb and Avelyn *v.* Ward, while, on the other hand, the principle of Jones *v.* Westcomb, and more especially that of Avelyn *v.* Ward, has been fully recognized in Doe d. Wells *v.* Scott, (*x*) already stated, [and other cases.] (*y*)

There is, it is submitted, a solid difference between sustaining a devise which is to take effect in the event of a person not *in esse* dying under a certain age, though such person never came into existence, and holding it to take effect in the event of his being born and dying *above* that age in the lifetime of the testator. In the former case, the contingency of no such person coming *in esse* may be considered as included and implied in the contingency expressed; but, in the latter, the event to which it would be applied is the exact opposite or alternative of that on which the substituted gift is dependent. (*z*) To let in the ulterior devise in such case would be to give the estate to one, in the very event in which the testator has declared that it shall go to another, whose incapacity, by reason of death, to take, seems to form no solid ground for changing its object. In the event which has happened, the lapsed devise must be read as an absolute gift.

(*t*) See Shergold *v.* Boone, 13 Ves. 370, *ante* p. *768.]

(*u*) 1 Ves. & B. 385.

(*x*) 3 M. & Sel. 300, *ante* vol. I., p. *648.

(*y*) See 4 K. & J. 603, 9 H. L. Cas. 420.

[(*z*) If the event on which the substituted gift depends actually happens in the testator's lifetime, the substituted gift takes effect, *ante* p. *762. There is a *dictum* in Greated *v.* Greated, 26 Beav. 628, 629, apparently *contra: sed qu.*]

The same principles which determine the effect upon a posterior or executory gift of the failure of a prior gift, apply also *to the converse case, namely, that of the failure of an ulterior or executory gift, and the consequence of such failure on the prior gift.[3] According to these principles, if lands are devised to A and his heirs, and in case he shall die without issue living at his decease, then to B and his heirs, and B dies in the testator's lifetime, and afterwards A dies accordingly without issue, having survived the testator; the event having happened upon which the ulterior devise would have taken effect, and that devise having failed by lapse in the testator's lifetime, the title of the heir is let in; or (if the will be regulated by the new law) then the title of the residuary devisee, the effect being precisely the same, in the events which have happened, as if the ulterior devise had been a simple absolute devise in fee. (a) On the other hand, if the devise were to A and his heirs, and if he should die without leaving issue at his decease, then to B for life, with remainder to his children in fee, and A, having survived the testator, dies without leaving issue, and B also dies without having had a child, (whether such event happens in the testator's lifetime or after his decease,) the devise to A becomes absolute and indefeasible, by the removal out of the way of the executory devise engrafted thereon; such devise having failed (not by lapse, as in the former case, but) by the failure of the event on which it was made dependent. (b) If B had had a child, and such child had died in the testator's lifetime, the case would, it should seem, according to the principle of the case of Tarbuck v. Tarbuck, (c) have become assimilated, to the case first stated.

Effect upon prior gift, of failure of executory gift.

When prior gift made absolute by failure of executory gift.

The difference then, in short, is between a failure of the posterior gift by lapse, letting in the title of the heir or residuary devisee, (as the case may be,) and a failure in event, of which the prior devisee has the benefit.

3. A limitation over being void for remoteness, the prior limitation is thereby made absolute, Brattle Square Church v. Grant, 3 Gray 156; so if void on account of incapacity of the devisee to take, Leslie v. Marshall, 31 Barb. 560.

[(a) See O'Mahoney v. Burdett, L. R., 7 H. L. 388, 407 (legacy.)]

(b) Jackson v. Noble, 2 Kee. 590. [As to this case see vol. I., pp. *867, *868.]

(c) *Ante* p. *834.

*CHAPTER LI.

GENERAL RULES OF CONSTRUCTION.

General rules of construction.

There are certain rules of construction common to both deeds and wills; but as, in the disposition of property by deed, an adherence to settled forms of expression is either rigidly exacted by the courts, or maintained by the practice of the profession, the rules to which the construction of deeds has given rise are comparatively few and simple. But the peculiar indulgence extended to testators, who are regarded as *inopes consilii*, has exempted the language of wills from all technical restraint, and withdrawn them in some degree from professional influence. By throwing down these barriers, a wide field is laid open to the caprices of language; though, at certain points, we have seen, its limits are ascertained by rules sufficently definite, and we are guided through its least beaten tracks by general principles.

It has been a subject of regret with eminent judges, (*a*) that wills were not subjected to the same strict rules of construction as deeds, since the relaxation of those rules introduced so much uncertainty and litigation; and was, indeed, at an early period, productive of so much embarrassment, as to draw from Lord Coke (*b*) the observation, that "wills, and the construction of them, do more perplex a man than any other learning; and, to make a certain construction of them, this *excedit jurisprudentum artem*. But," he adds, "I have learned this good rule, always to judge in such cases, as near as may be and according to the rules of law."

This quotation will serve to introduce the observation, that though the intention of testators, when ascertained, is implicitly obeyed, however informal the language in which it may have been conveyed; yet

(*a*) See Lord Kenyon's judgment in Denn d. Moor *v.* Mellor, 5 T. R. 561; Doe *v.* Allen, 8 Id. 502. See also Wilm. 398.

(*b*) 2 Bulst. 130.

the courts, in construing that language, resort to certain established rules, by which particular words and expressions, standing unexplained, have obtained a definite *meaning; which meaning, it must be confessed, does not always quadrate with their popular acceptation. This results from the intendment of law, which presumes every person to be acquainted with its rules of interpretation, (c) and consequently to use expressions in their legal sense—*i. e.*, in the sense which has been affixed by adjudication to the same expressions occurring under analogous circumstances: a presumption which, though it may sometimes have disappointed the intention of testators, is fraught with great general convenience; for, without some acknowledged standard of interpretation, it would have been impossible to rely with confidence on the operation of any will not technically expressed, until it had received a judicial interpretation. And, indeed, dispositions conceived in the most appropriate forms of expression, must have been rendered precarious by a license of construction which set up the intention, to be collected upon arbitrary notions, as paramount to the authority of cases and principles. In such a state of things the most elaborate treatise on the construction of wills, though it might perhaps, like other curious researches, prove interesting to some inquirers into the wisdom and sagacity of our ancestors, could contribute little or nothing towards placing the law of property, as it regards testamentary dispositions, on a secure and solid foundation. It is, therefore, necessary to remind the reader, that the language of courts, when they speak of the intention as the governing principle, sometimes calling it "the law" of the instrument, (d) sometimes the "pole star," (e) sometimes the "sovereign guide," (f) must always be understood with this important limitation—that here, as in other instances, the judges submit to be bound by precedents and authorities in point; and endeavor, as we have seen, to collect the intention upon grounds of a judicial nature, as distinguished from arbitrary occasional conjecture. (g)

(c) See Doe d. Lyde v. Lyde, 1 T. R. 596; Langham v. Sanford, 2 Mer. 22. But see Lord Thurlow's judgment in Jones v. Morgan, 1 B. C. C. 221; and Lord Alvanley's observations in Seale v. Barter, 2 B. & P. 594.

(d) Per Lord Hale, in King v. Melling, 1 Vent. 231.

(e) Per Wilmot, C. J., in Doe d. Long v. Laming, 2 Burr. 1112.

(f) Per Wilmot, C. J., in Roe d. Dodson v. Grew, 2 Wils. 322.

[(g) "The intention must be discovered from the words of the will itself. The court must proceed on known principles and established rules, not on loose conjectural interpretations, or by considering what a man may be imagined to do in the testator's circumstances:" per Henley, L. K., 1 Ed. 43. See also 1 Ves., Jr.,

*The result, upon the whole, has been satisfactory; for, by the application of established rules of construction, with due attention to particular circumstances, a degree of certainty has been attained, which must have been looked for in vain, if less regard had been paid to the principles of anterior decisions. And, though the cases on the construction of wills have become, by the accumulation of more than three centuries, immensely numerous; yet when we consider the vast augmentation which, during this period, and the last century in particular, has taken place in the wealth and population of the country; the several new species of property, which the ever-varying exigencies of a commercial nation have from time to time called into existence, and to which the rules of construction were to be applied; the complexity which a more refined and artificial state of society has introduced into dispositions of property; and lastly, the more extensive use of the art of writing, leading to increased facility in the exercise of the testamentary power—we are prepared to expect an incessantly growing accession to questions of this nature. But it will be found, I apprehend, that, so far from having increased in a corresponding ratio, they have, and particularly at a recent period, numerically diminished.

This must be attributed partly to the more frequent practice of resorting to, and the increased facility of obtaining, professional assistance in the preparation of wills; and partly to the maturity which the system of construction has gradually attained, and which enables persons conversant with the subject, in most cases, to predict with a considerable approach to certainty, what would be the decision of a court of judicature in any given case; and, consequently, to render an appeal to its authority unnecessary. (*h*)

Some uncertainty, it will be admitted, is inseparable from the nature of the subject. Many of the rules of construction are such as necessarily involve uncertainty in the application of them to particular cases; and, in a few instances, the rules themselves are, we have seen, yet subjects of controversy. To discuss and illustrate these rules has been the design of the writer in the preceding pages.

564; 10 H. L. Cas. 85; L. R., 6 Ch. 239; *ante* vol. I., p. *535. But as to authority in mere verbal interpretation see 6 H. L. Cas. 108; L. R., 10 Ch. 398, n.; 4 Ch. D. 68; unless the words are precisely the same, 1 H. & M. 549.

(*h*) The stat. 1 Vict., c. 26, also, has obviated many questions regarding real estate. Nevertheless, there are in the present edition of this treatise more than twice as many cases as in the first, and (in round numbers) 1500 more than in the third.]

*It may be useful, however, in conclusion, to present to the reader a summary of the several rules of construction which have already been the subject of detailed examination.[1]

Summary of the rules of construction.

1. In this connection, the reader is referred to the following very recent decisions on some of the leading topics discussed in the former part of this treatise:

Of the power to make a will. Emmert *v.* Hays, 89 Ill. 11; O'Byrne *v.* Feeley, 61 Ga. 77.

Of the form and characteristics of the instrument. An instrument in the form of a letter construed to be a will, Cowley *v.* Knapp, 13 Vr. 297; so, too, an instrument in form of a deed, and under seal, Miller *v.* Holt, 68 Mo. 584; so, too, an instrument in form of a declaration of sale, Arnold *v.* Arnold, 62 Ga. 627; so, too, an instrument in form of an assignment of a policy of life insurance, Schad's Appeal, 88 Penna. St. 111; so, too, an informal paper, Conoly *v.* Gayle, 61 Ala. 116.

Execution and attestation. As to the position of witnesses, Mandeville *v.* Parker, 4 Stew. (N. J.) 242; Allen's Will, 25 Minn. 39.

As to the request of the testator to witnesses to sign as witnesses, Brown *v.* Clark, 77 N. Y. 369; Haynes *v.* Haynes, 33 Ohio St. 598; Allen's Will, *ubi supra;* Estate of Crittenden, Myrick's Prob. Reps. 50; Estate of Fusilier, Id. 40.

The presumption is that the witnesses to a will know what they are doing when attesting a will, Abbott *v.* Abbott, 41 Mich. 540. If the will be attested by the statutory number of competent witnesses, it will not be vitiated by being attested by others who are interested, Conoly *v.* Gayle, 61 Ala. 116. A holographic will will not be vitiated by the fact that witnesses have attested it, Succession of Roth, 31 La. Ann. 315. In Louisiana women are absolutely incapable of being witnesses to testaments, Id.

The will must be signed at the foot or end thereof, Estate of McCullough, Myrick's Prob. Reps. 76; Estate of Barker, Id. 78. But if the signature be above some clauses, the will will be sustained as to what precedes the signature, and the subsequent clauses will be rejected, Estate of McCullough, *ubi supra.* In a holographic will, however, the signature need not be at the end, Estate of Barker, *ubi supra.*

In Mississippi the will must be attested by witnesses unless *wholly* written and subscribed by the testator, Davis *v.* Williams, 57 Miss. 843. In California no formal attestation clause is necessary, Estate of Crittenden, Myrick's Prob. Reps. 128.

Requisites of attestation where will is signed by another for testator, Estate of Taney, Id. 210; Estate of Toomes, 54 Cal. 509.

Personal disabilities of testators. What is the degree of mental capacity requisite to make a will, Horn *v.* Pullman, 72 N. Y. 269; Brown *v.* Riggin, 94 Ill. 560; Todd *v.* Fenton, 66 Ind. 25; Young *v.* Ridenbaugh, 67 Mo. 574; Estate of Crittenden, Myrick's Prob. Reps. 50; Martin *v.* Perkins, 56 Miss. 204.

What are and what are not insane delusions, Coit *v.* Patchen, 77 N. Y. 533; Lee *v.* Scudder, 4 Stew. (N. J.) 633; Will of Blakely, 48 Wis. 294; Will of Cole, 49 Id. 179. The legal presumption is in favor of sanity, Will of Cole, *ubi supra.*

Evidence as to mental incapacity, Conely *v.* McDonald, 40 Mich. 150; Young *v.* Ridenbaugh, *ubi supra;* Dinges *v.* Branson, 14 W. Va. 100; Mooney *v.* Olson, 22 Kansas 69; May *v.* Bradlee, 127 Mass. 414; Lewis' Case, 6 Stew. (N. J.) 219; Eddy's Case, 5 Id. 701.

I. That a will of real estate, wheresoever made, and in whatever language written, is construed according to the law of England, in which the property is situate, (*i*) but a will of personalty is governed by the *lex domicilii.* (*k*)

If a testator be capable at the time of the execution of the last of several codicils, his will, and all the codicils thereto, will be established, though he might have been incapable at the time of the execution of the will or some of the earlier codicils, Brown *v.* Riggin, *ubi supra.*

Testamentary capacity established, although testatrix talked to herself and seldom managed her own affairs, Errickson *v.* Fields, 3 Stew. (N. J.) 634; so, too, where testator was ninety-three years of age, Sutton *v.* Morgan, Id. 629; see also Kise *v.* Heath, 6 Id. 239.

Undue influence. Undue influence must be proved in each case, Sutton *v.* Morgan, 3 Stew. (N. J.) 629; Kise *v.* Heath, 6 Id. 239.

If the influence asserted to be undue be long past and not in any way connected with the testamentary act, the will cannot be impeached on that account, Wainwright's Appeal, 89 Penna. St. 220.

There is no presumption against the validity of any provision which a husband may make in his wife's favor, Latham *v.* Udell, 38 Mich. 238. Nor does the fact that testator's wife urged upon him the propriety of leaving his property to her constitute undue influence, Hughes *v.* Murtha, 5 Stew. (N. J.) 288. Nor is the influence of kind and faithful service by an attendant undue, Eddy's Case, Id. 701. Nor will the fact that the principal beneficiary under the will was the partner of the testator, *per se* raise a presumption of undue influence, Estate of Brooks, 54 Cal. 471.

The bearing of a change of testamentary intention upon the question of undue influence, Horn *v.* Pullman, 72 N. Y. 269.

What evidence is admissible on a question of undue influence, Reynolds *v.* Adams, 90 Ill. 134; Griffith *v.* Diffendeifer, 50 Md. 466; Todd *v.* Fenton, 66 Ind. 25; Will of Ames, 51 Iowa 596; Dinges *v.* Branson, 14 W. Va. 100; Mooney *v.* Olson, 22 Kansas 69; May *v.* Bradlee, 127 Mass. 414.

What influence amounts to undue influence, Coit *v.* Patchen, 77 N. Y. 533, 541; Errickson *v.* Fields, 3 Stew. (N. J.) 634.

Revocation. A former will is revoked by the publication of a later one, and becomes invalid, State *v.* Crossley, 69 Ind. 203.

Republication. By execution of a codicil with due formalities, Brown *v.* Clark, 77 N. Y. 369. Revival of an earlier, by revocation of a later, will, Randall *v.* Beatty, 4 Stew. (N. J.) 643.

Life estate not enlarged into a fee. It is not so enlarged by a power to sell, Reinders *v.* Koppelmann, 68 Mo. 482. Nor will a larger estate be *implied* where a smaller one is *expressly* granted, Wetter *v.* Walker, 62 Ga. 142.

Charitable uses. What constitutes a charitable use, Dodge *v.* Williams, 46 Wis. 70.

Aliens. When devise to such will not lapse, Snider *v.* Robertson, 9 S. C. 213.

Election. Parties put to an election between land and another fund have no right to call for a sale of the land to ascertain its value before making their election; they must rely upon their own judgment, Weeks *v.* Weeks, 79 N. C. 77.

The effect upon provisions in the will of election by the widow, Dean *v.* Hart, 62 Ala. 308; Jones *v.* Lloyd, 33 Ohio St. 572.

Where a widow takes possession under

(*i*) Pre. Ch. 577; *ante* vol. I., p. *1.

(*k*) *Ante* vol. I., p. *2.

II. That technical words are not necessary to give effect to any species of disposition in a will. (*l*)

III. That the construction of a will is the same at law and in equity, (*m*) the jurisdiction of each being governed by the nature of the subject; (*n*) [2] though the consequences may differ, as in the instance of a contingent remainder, which is destructible in the one case and not in the other. (*o*)

IV. That a will speaks, for some purposes, from the period of execution, and for others from the death of the testator; but never operates until the latter period. (*p*)

V. That the heir is not to be disinherited without an express devise or necessary implication; (*q*) such implication importing, not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed. (*r*) [3]

VI. That merely negative words are not sufficient to exclude the

her husband's will and occupies the land, with the knowledge of the heirs-at-law, after the time limited by statute within which she may make her election, she will be presumed to have made her election in fact, Nimmons *v.* Westfall, 33 Ohio St. 213.

If a testator undertakes to dispose of property of a third person, and such person accepts a bequest or devise under the will, such acceptance is a confirmation of the disposition by the will, Noe *v.* Splivalo, 54 Cal. 207.

Estates upon condition. When there is a condition precedent which consists of several particulars, every particular must be performed before the estate can vest or take effect, Nevius *v.* Gourley, 95 Ill. 206. Any words that convey the proper meaning will create a condition; the expression "on condition" is not necessary, Stillwell *v.* Knapper, 69 Ind. 558.

(*l*) 3 T. R. 86; 11 East 246; 16 Id. 222.

(*m*) 3 P. W. 259; 2 Ves. 74; [4 Jur. (N. S.) 625, 27 L. J., Ch. 726.]

(*n*) 1 Ves., Jr., 16; 2 Id. 417; 4 Ves. 329.

2. A Court of Chancery will never vest an estate when, by reason of a condition precedent, it will not vest in law, Nevius *v.* Gourley, 95 Ill. 206.

[(*o*) See now as to contingent remainders, *ante* vol. I., p. *874.]

(*p*) *Vide ante* ch. X.

(*q*) Br. Devise 52; Dyer 330 b; 2 Stra. 969; Cas. temp. Hardw. 142; 1 Wils. 105; Willes 309; 2 T. R. 209; 2 M. & Sel. 448. See also 3 B. P. C. Toml. 45; [see vol. I., p. *532.]

(*r*) 1 Ves. & B. 466; 5 T. R. 558; 7 East 97; 1 B. & P. N. R. 118; 18 Ves. 40. ["There is hardly any case where implication is of necessity; but it is called necessary because the court finds it so to answer the intention of the devisor." Per Lord Hardwicke, Coryton *v.* Helyar, 2 Cox 340, 348.]

3. Gelston *v.* Shields, 78 N. Y. 275; Irwin *v.* Zane, 15 W. Va. 646.

But see Powers *v.* McEachern, 7 S. C. 290, where a devise to testator's wife and all his then living children was held to carry the estate to a woman with whom he was living in adultery and her children, to the exclusion of his lawful wife and her children.

title of the heir or next of kin. (s) There must be an actual gift to some other definite object.

VII. That all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole,[4] but, where several parts are absolutely irreconcilable, the latter must prevail. (t)[5]

VIII. That extrinsic evidence is not admissible to alter, detract from, or add to, the terms of a will, (u), (though it may *be used to rebut a resulting trust attaching to a legal title created by it, (x) or to remove a latent ambiguity[6] [arising from words equally descriptive of two or more subjects or objects of gift.)] (y)

IX. Nor to vary the meaning of words; (z) and, therefore, in order to attach a strained and extraordinary sense to a particular word, an instrument executed by the testator, in which the same word occurs in that sense, is not admissible, (a) but

X. The court will look at the circumstances under which the devi-

(s) *Ante* vol. I., pp. *339, *623; 4 Beav. 318; [6 Hare 145.]

4. Welsch v. Belleville Savings Bank, 94 Ill. 191; Banks v. Jones, 60 Ala. 605; Nimmons v. Westfall, 33 Ohio St. 213.

(t) 9 Mod. 154; 2 W. Bl. 976; 1 T. R. 630; 6 Ves. 100, 129; 16 Ves. 314; 3 M. & Sel. 158; 1 Sw. 28; 2 Atk. 372; 6 T. R. 314; 2 Taunt. 109; 18 Ves. 421; 6 Moore 214; [6 Hare 492; *ante* ch. XV.] But see Barnard C. C. 261.

5. Murfitt v. Jessop, 94 Ill. 158; Hemphill v. Moody, 62 Ala. 510, 513; McNeill v. Caruthers, 4 Bradwell 552; Bromfield v. Wilson, 78 Ill. 467; Succession of Law, 31 La. Ann. 456. *Ante* vol. I., p. 44, n. 1.

(u) See judgment in 16 Ves. 486; 5 Rep. 68; Cas. temp. Talb. 240; 3 B. P. C. Toml. 607; 2 Ch. Cas. 231; 7 T. R. 138; [*ante* ch. XIII.]

(x) Cas. temp. Talb. 78; *ante* vol. I., p. *416.

6. Powers v. McEachern, 7 S. C. 290, 293; Tuxbury v. French, 41 Mich. 7; Black v. Hill, 32 Ohio St. 313; Burthe v. Denis, 31 La. Ann. 568; Dunham v. Averill, 45 Conn. 61; Woodruff v. Migeon, 46 Id. 236; Jenkins v. Merritt, 17 Fla. 304; Gillespie v. Schuman, 62 Ga. 252; Griscom v. Evens, 11 Vr. 402.

As to parol evidence, to show advancements on account of a legacy, especially charges in books by parent against a child in New Jersey, see Van Houten v. Post, 6 Stew. (N. J.) 344.

"It would be a dangerous doctrine to establish, and one without precedent, that where the language of the will is plain, and the residuary clause, in terms, disposes of the whole estate, and there are no qualifying words in any part of the will, you may introduce extrinsic evidence to show that the testator did not know that certain property which he owned actually belonged to him, for the purpose of restricting the natural meaning and operation of the will." Bartol, C. J., in Stannard v. Barnum, 51 Md. 440, 451

Extrinsic parol evidence is admissible to show that the omission of a child by the testator was intentional, Peters v. Siders, 126 Mass. 135.

Ante vol. I., p. 748.

[(y) *Ante* vol. I., p. *437.]

(z) 4 Taunt. 176; 4 Dow 65; 3 M. & Sel. 171. But see 2 P. W. 135.

(a) 14 East 441; [*ante* vol. I., p. *417.]

sor makes his will—as the state of his property, (*b*) of his family, (*c*) and the like. (*d*) [7]

XI. That, in general, implication is admissible only in the absence of, and not to control, an express disposition. (*e*) [8]

XII. That an express and positive devise cannot be controlled by the reason assigned, (*f*) or by subsequent ambiguous words (*g*) or by inference and argument from other parts of the will; (*h*) [9] and, accordingly, such a devise is not affected by a subsequent inaccurate recital of, or reference to, its contents; (*i*) [10] though recourse may be had to such reference to assist the construction, in case of ambiguity or doubt. (*k*)

XIII. That the inconvenience or absurdity of a devise is no ground for varying the construction, where the terms of it are unambiguous; [11] (*l*) nor is the fact, that the testator did not foresee all the consequences of his disposition a reason for varying it; (*m*) but, where the intention is obscured by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent purpose. (*n*)

XIV. That the rules of construction cannot be strained to bring a devise within the rules of law; (*o*) but it seems that, *where the will

(*b*) 1 Mer. 646; 7 Taunt. 105; 1 B. & Ald. 550; 3 B. & Cr. 870; 1 B. C. C. 472.

(*c*) 3 B. P. C. Toml. 257; 4 Burr. 2165; 4 B. C. C. 441; 3 B. & Ald. 657; 3 Dow 72; 3 B. & Ald. 632; 2 Moore 302.

[(*d*) See 5 M. & Wel. 367, 368.]

7. *Ante* vol. I., p. 734, n. 9; Griscom *v.* Evens, 11 Vr. 402.

[(*e*) Dyer 330 b]; 8 Rep. 94; 2 Vern. 60; 1 P. W. 54; [*ante* vol. I., p. *551.]

8. Elder *v.* Lantz, 49 Md. 186; Wetter *v.* Walker, 62 Ga. 142.

(*f*) 16 Ves. 46; [*ante* vol. I., p. *483.]

(*g*) 2 Cl. & Fin. 22, 8 Bligh (N. S.) 88; [4 De G. & J. 30; *ante* vol. I., p. *484.]

(*h*) 1 Ves., Jr., 268; 8 Ves. 42; Cowp. 99.

9. Where a testator bequeathed to M. $8000, and to the children of J. N. $8000, M. being one of the children of J. N., it was held that whether M. took the $8000 only, or, in addition thereto, one-fourth of the legacy to the children of J. N. depended entirely upon the intention of the testator as manifested by the language he had used, Orrick *v.* Boehm, 49 Md. 72. Irrelevant recitals will not vitiate a will, Conoly *v.* Gayle, 61 Ala. 116.

(*i*) Moore 13, pl. 50; 1 And. 8; [*ante* vol. I., pp.*484, *531.]

10. Where there is in the first place an unambiguous and certain description of the thing devised and afterwards another description which fails in certainty, the latter must be rejected, Jones *v.* Robinson, 78 N. C. 396.

[(*k*) *Ante* vol. I., pp. *483, *531]

11. Toms *v.* Williams, 41 Mich. 552.

(*l*) 1 Mer. 417; 2 S. & Stu. 295; [3 D., J. & S. 553, 554.]

(*m*) 3 M. & Sel. 37; 1 Mer. 358.

(*n*) 4 Mad. 67. See also 3 B. C. C. 401; [1 De G. & J. 32; 3 Drew. 724; 7 H. L. Cas. 89; 6 Ch. D. 248.]

(*o*) 1 Cox 324; 2 Mer. 389; 1 J. & W. 31; [8 Hare 48, 186.] But see 2 R. & My. 306; 2 Kee. 756; 2 Beav. 352.

admits of two constructions, that is to be preferred which will render it valid; and therefore the court in one instance, adhered to the literal language of the testator, though it was highly probable that he had written a word by mistake for one which would have rendered the devise void. (*p*)

XV. That favor or disfavor to the object ought not to influence the construction. (*q*)

XVI. That words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, (*r*) and that other can be ascertained;[12] and they are, in all cases, to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative; (*s*) and of two modes of construction, that is to be preferred which will prevent a total intestacy. (*t*)[13]

XVII. That, where a testator uses technical words, he is presumed to employ them in their legal sense, (*u*) unless the context clearly inditates the contrary. (*x*)[14]

XVIII. That words, occurring more than once in a will, shall be presumed to be used always in the same sense, (*y*) unless a contrary intention appear by the context, (*z*) or unless the words be applied to a different subject. (*a*) And, on the same principle, where a testator

(*p*) 3 Burr. 1626; 3 B. P. C. Toml. 299. [See also 2 Coll. 336; L. R., 5 H. L. 548.]

(*q*) See 4 Ves. 574. But see 2 Ves. & B. 269; [and *ante* vol. I., p. *570.]

(*r*) 18 Ves. 466; [4 C. B. (N. S.) 790.]

12. Keteltas *v.* Keteltas, 72 N. Y. 312; Pruden *v.* Paxton, 79 N. C. 446; Kelly *v.* Reynolds, 39 Mich. 464; Carter *v.* Reddish, 32 Ohio St. 1; Castner's Appeal, 88 Penna. St. 478.

The word "possession" may include real estate, if the context shows that to be the clear intention of the testator, Blaisdell *v.* Hight, 69 Me. 306.

(*s*) 3 Ves. 450; 7 Id. 458; 7 East 272; 2 B. & Ald. 441; [*ante* p. *141. But see 2 D., F. & J. 454; L. R., 6 H. L. 33.]

(*t*) Cas. temp. Talb. 161; [4 Ves. 406]; 2 Mer. 386.

13. Elder *v.* Lantz, 49 Md. 186, 199; Toms *v.* Williams, 41 Mich. 552; Banks *v.* Jones, 60 Ala. 605.

(*u*) Doug. 340; 6 T. R. 352; 4 Ves. 329; 5 Ves. 401; [6 Ch. D. 496; 19 C. B. (N. S.) 780; *ante*, ch. XXXVII.]

(*x*) Doug. 341; 3 B. C. C. 68; 5 East 51; 2 Ba. & Be. 204; 3 Dow 71.

14. Clark *v.* Smith, 49 Md. 106. But words of recommendation, and others precatory in their nature, are not to be construed as peremptory unless by the context of the will that meaning is forced upon them, Williams *v.* Worthington, 49 Md. 572. The word "*heirs*" is flexible and should be so construed as to give effect to the manifest intention of the testator, Jones *v.* Lloyd, 33 Ohio St. 572.

(*y*) 2 Ch. Cas. 169; [Doug. 268; 3 Drew. 472.

(*z*) *Ante* p. *104, n. (*q*).]

(*a*) 1 P. W. 663; 2 Ves. 616; 5 M. & Sel. 126; 1 Ves. & B. 260. But see 14 Ves. 488.

uses an additional word or phrase, he must be presumed to have an additional meaning. (*b*) [15]

XIX. That words and limitations may be transposed, (*c*) supplied, (*d*) or rejected, (*e*) where warranted by the immediate context, or the general scheme of the will; but not merely on a conjectural hypothesis of the testator's intention, however *reasonable, in opposition to the plain and obvious sense of the language of the instrument. (*f*) [16]

XX. That words, which it is obvious are mis-written (as dying *with* issue, for dying *without* issue), may be corrected. (*g*) [17]

XXI. That the construction is not to be varied by events subsequent to the execution; (*h*) but the courts, in determining the meaning of particular expressions, will look to possible circumstances, in which they *might* have been called upon to affix a signification to them. (*i*) [18]

XXII. That several independent devises, not grammatically connected, or united by the expression of a common purpose, must be construed separately, and without relation to each other; although it may be conjectured, from similarity of relationship, or other such circum-

(*b*) 4 B. C. C. 15; 13 Ves. 39; 7 Taunt. 85. The writer has heard Lord Eldon lay down the rule in these words. But see Amb. 122; 6 Ves. 300; 10 Ves. 166; 13 East 359; 13 Ves. 476; 19 Ves. 545; 1 Mer. 20; 3 Mer. 316;—where the argument that the testator, notwithstanding some variation of expression, had the same intention in several instances, prevailed.

15. The word "*maturity*" was held to mean the same thing as the testator had before expressed by the words "*lawful age*," in Carpenter *v.* Boulden, 48 Md. 122; so, too, "*proceeds*," and "*income*." Thompson's Appeal, 89 Penna. St. 36; so, too, "*advanced*" and "*loaned*;" Wright's Appeal, Id. 67; so, too, "*applied*" and "*paid over*," Moore *v.* Hegeman, 72 N. Y. 376.

But where a testator by will gave $1000 to D, and by a codicil executed two years after the will gave $1000 to D, it was held to be an additional bequest, Hollister *v.* Shaw, 46 Conn. 248.

(*c*) 2 Ch. Cas. 10; Hob. 75; 2 Ves. 32; Amb. 374; 8 East 149; 15 East 309; 1 B. & Ald. 137; [*ante* vol. I., p. *499.] But see 2 Ves. 248.

(*d*) Cro. Car. 185; 7 T. R. 437; 6 East 486; 2 D. & Ry. 398. See also 2 Bl. 1014; [and *ante* vol. I., p. *486.]

(*e*) 2 Ves. 277; 3 T. R. 87, n.; 3 Id. 484; 4 Ves. 51; 5 Ves. 243; 6 Ves. 129; 12 East 515; 9 Ves. 566; [and *ante* vol. I., p. *479.]

(*f*) 18 Ves. 368; 19 Id. 652; 2 Mer. 25.

16. An estate given by will may be extended or enlarged where it is apparent to the court that such a course is necessary to effectuate the intention of the testator, Kirkland *v.* Cox, 94 Ill. 400; Latham *v.* Udell, 38 Mich. 238.

(*g*) 8 Mod. 59; 5 B. & Ad. 621; 3 Ad. & El. 340; [2 D., M. & G. 300.]

17. Emmert *v.* Hays, 89 Ill. 11.

(*h*) Cas. temp. Talb. 21; 3 P. W. 259; 11 East 558, n.; 1 Cox 324; 1 Ves., Jr., 475. [But see *ante* vol. I., p. *254.]

(*i*) 11 Ves. 457; [6 Ves. 133.]

18. Jenkins *v.* Merritt, 17 Fla. 304.

stances, that the testator had the same intention in regard to both. (*k*) There must be an apparent design to connect them. (*l*)

XXIII. That where a testator's intention cannot operate to its full extent, it shall take effect as far as possible. (*m*)

XXIV. That a testator is rather to be presumed to calculate on the dispositions in his will taking effect, than the contrary;[19] and, accordingly, a provision for the death of devisees will not be considered as intended to provide exclusively for lapse, if it admits of any other construction. (*n*)[20]

(*k*) Cro. Car. 368; Doug. 759; 8 T. R. 64; 1 B. & P. N. R. 335; 9 East 267; 11 Id. 220; 14 Ves. 364; 4 M. & Sel. 58; 1 Pri. 353; 4 B. & Cr. 667. See also Godb. 146.

(*l*) Leon. 57; Cas. temp. Hardw. 143; 10 East 503. This and the former class of cases chiefly relate to a question of frequent occurrence, whether words of limitation, preceded by several devises, relate to more than one of those devises.

(*m*) Finch 139. See also 4 Ves. 325; 13 Ves. 486.

19. All doubts must be resolved in favor of the testator's having said exactly what he means, Burnet *v.* Burnet, 3 Stew. (N. J.) 595. And a testator is supposed to intend by his will to dispose of his whole estate, Irwin *v.* Zane, 15 W. Va. 646.

(*n*) 2 Atk. 375; 4 Ves. 418; 4 Ves. 554; 7 Ves. 286; 1 Ves. & B. 422; 1 Pri. 264. See also 1 Sw. 161; 2 Ves. Jr., 501; McClel. 168.

20. Cowley *v.* Knapp, 13 Vr. 297.

*APPENDIX.

OBSERVATIONS ON COLE v. SEWELL. (a)

It is clear, and indeed it is not denied by Sir E. Sugden, that there was even in the ancient law a principle which was inimical to future limitations of property that savored of remoteness. Unless this were the case, the rule against perpetuities (which was merely the application of this principle to a new species of limitations) never would have had existence. He, however, unequivocally declares his opinion to be, that at this day all contingent remainders (including, therefore, as well common law remainders as those created by way of use) are withdrawn from every species of perpetuity restraint; from the old doctrine because it is exploded, and from the new (*i. e.*, the rule against perpetuities) because such rule is applicable only to executory devises and springing and shifting uses, *i. e.*, to those modifications of ownership which the statute of uses call into existence.

It is difficult to conceive how any legal doctrine once established could cease to operate so long as the subject matter to which it applies endures, and the reason on which it is founded remains in force. A remainder is now precisely what it was in the time of Littleton, and must, therefore, one should think, be governed by the same rules, and still be amenable to the ancient doctrine of the law, which forbade limitations that savored of remoteness. How else are we to account for the often-repeated proposition, that you cannot give an estate for life to an unborn person, with remainder to his issue; and for the several cases in which attempts to limit estates for life to a succession of unborn persons have been pronounced to be illegal? Of this we have an

(a) As reported, 2 Con. & L. 344, referred to *ante* vol. I., pp. *257, *262.

example in Seward *v.* Willock, (*b*) where the devise was "to A for life, and, after him, to his eldest or any other son after him for life, and after them, to as many of his descendants, issue male, as should be heirs of his or their bodies, **down to the tenth generation*" during their natural lives; and it was held, that A took no more than a life estate, for that here was no general intent to give an estate tail to the first taker, as contra-distinguished from the particular intent to give an estate for life, but a single intent to give estates for life to A and, after him, to his sons, and, after them, to their sons down to the tenth generation; but this he could not do by law, inasmuch *as the law would not allow of a successive limitation of estates for life to persons unborn.*

Here, it will be observed, the limitations pronounced to be illegal, were remainders at common law; but this circumstance was not adverted to by the court, nor have we any reason to conclude that a series of remainders, limited by way of use would have had a better fate. But the authorities do not stop here.

The cases involving the doctrine of *cy pres* are, it is submitted, quite conclusive against the supposed exemption of remainders, however created, from all restraint in respect to perpetuity. By that doctrine, it will be remembered, limitations to an unborn person for life, with remainder to the first and other sons successively of such person in strict settlement, operate to confer on the intended tenant for life an estate tail, for the purpose of giving effect to the general intention, so far as possible consistently with the rule of law, which does not permit an estate for life to be given to an unborn person, with remainder to his issue.

The impossibility of the limitations taking effect in the manner intended, is the avowed and the only justifiable ground of this bold interference with the declared intention of the testator; and if the law would have allowed of their operating according to that intention, this doctrine, which makes so important a figure in our books, would have been wholly uncalled for.

There is, it is conceived, no analogy, or rather not a complete analogy, between the case of a contingent remainder capable of being destroyed (*c*) and that (referred to by Sir E. Sugden) of a remainder

(*b*) 5 East 198. See, also, Lord Hardwicke's judgment in Hopkins *v.* Hopkins, 1 Atk. 580; Co. Litt. 271 b, Butl. n.

(*c*) It is observable that in Seward *v.* Willock the remainders pronounced to be bad were all capable of being destroyed by the tenant for life.

preceded by an estate tail capable of being enlarged. By the latter, the party destroying the entail acquires the fee simple, by the former, he merely extinguishes the contingent remainder for the benefit of the person entitled to the next vested remainder or reversion; unless, therefore, such ulterior remainder or reversion belongs to himself, he would have no interest in effecting the destruction of the intervening remainders; indeed, if the latter were limited to his own descendants, (as is commonly the case,) of course he has the strongest incentive for their preservation. (*d*)

In the statute of limitations, too, (3 and 4Will. IV., c. 27,) the distinction between the two cases is tacitly recognized, the legislature having made the eviction of a tenant in tail extend to all those whom he might have barred; but not having applied the same principle *to a tenant for life in relation to a destructible contingent remainder. The doctrine in question would be fraught with danger to titles; a possession of 60, or even 100 years, would be no security against eviction; for a latent settlement might be produced of even greater antiquity, limiting a long series of life estates to unborn persons, each of whom would, in his order, have a distinct right of entry as his estate fell into possession. In short, it would be impossible to affirm of any apparent owner, that he might not at some day be exposed to eviction. If it be alleged that this danger exists in the case of an estate tail, (as must be admitted to a certain extent to be the case, notwithstanding the enactment just referred to,) does it therefore follow that we ought, by proceeding on a strained analogy, to extend such danger?

The necessity for a contingent remainder taking effect, if at all, at the instant of the determination of the particular estate, affords no safeguard against remoteness, as the particular estate itself may be limited to an unborn person; for, of course, a limitation which is itself a remainder in relation to an estate which precedes, may become a particular estate in relation to an estate which follows. Thus, if lands were limited to A for life, with remainder to B, if living at A's decease, remainder to C, if living at B's decease, the estate of B would be, during A's lifetime, a remainder, and, after A's decease, would become the particular estate to the remainder of C.

It is submitted, therefore, that both principle and authority justify the questioning the proposition that remainders owe obedience to no

(*d*) See, also, the ground suggested *ante* vol. I., p. *260.

other law than that which requires that they should take effect at the instant of the determination of the particular estate. (e) They are, it is conceived, either subject to the old doctrine, directed against remote possibilities, or the modern rule against perpetuities, unless these are identical, as may be contended with much plausibility, although it is not necessary to go to this extent in support of the denial of the exemption of remainders from all perpetuity—restraint. The matter seems to stand thus: we find in the earlier authorities a general expression of the repugnance of the law to limitations which savour of remoteness, but without any distinct definition of the limits which it allows. When uses arose, with the consequent new modifications of ownership, the necessity of preventing perpetuities was more urgently felt, and the denunciations against them were repeated with greater frequency and vehemency, but still, for some time at *least, with the same absence as formerly of distinct intimation as to the actual extent of the legal restriction, until at length, after many gradations, the present well-known rule was distinctly and authoritatively propounded. May it not, then, fairly be presumed, that the rule, thus eventually elicited from the judges, is, in fact, no other than the doctrine which, in the old language of the law, forbade the limiting a possibility upon a possibility?

The identification of the ancient and modern doctrine would avoid many anomalous and inconvenient distinctions, and reduce all to coherence and consistency, and would, moreover, rescue the judges who fixed the perpetuity rule from the charge of exceeding the due limits of judicial authority. It may fairly be questioned whether they were justified in imposing a new restraint, *of their own creation*, on the limitations to which the statute of uses had given rise. It was the province of the legislature to have applied whatever restrictions were required for the new modifications of ownership which they had called into existence; though, if there was an actual pre-existing rule

(e) The views which the writer has here ventured to express (he is pleased to find) coincide with those of Mr. Lewis, in his Treatise on the Law of Perpetuity, p. 495, a work of much research and ability; but the writer of these sheets differs from the learned author when he urges, as a reason for applying to contingent remainders the rule against perpetuities, the possibility of remote remainders being preserved from destruction by estates interposed in trustees. It is submitted, that such remainders in trust, if expectant on the estate for life of unborn persons, would be themselves necessarily contingent, and, therefore, equally liable to destruction.

of law applicable in its nature thereto, the courts might, without any great stretch of judicial power, apply it to the new species of limitation, seeing that it was within the mischief which that rule was intended to prevent.

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*SUGGESTIONS TO PERSONS TAKING INSTRUCTIONS FOR WILLS.

Few of the duties which devolve upon a solicitor, more imperatively call for the exercise of a sound, discriminating, and well-informed judgment, than that of taking instructions for wills. It frequently happens, that, from a want of familiar acquaintance with the subject, or from the physical weakness induced by disease (where the testamentary act has been, as it too often is, unwisely deferred until the event which is to call it into operation seems to be impending,) testators are incapable of giving more than a general or imperfect outline of their intention, leaving the particular provisions to the discretion of their professional adviser. Indeed, some testators sit down to this task with so few ideas upon the subject, that they require to be informed of the ordinary modes of disposition under similar circumstances of family and property, with the advantages and disadvantages of each; and their judgment in the selection of one of these modes, is necessarily influenced by, if not wholly dependent on, professional recommendation. To a want of complete and accurate information as to the consequences of their proposed schemes, must be ascribed many of the absurd and inconvenient provisions introduced into testamentary gifts; to say nothing of the obscurities and inconsistencies which frequently throw an impenetrable cloud over the testator's real intentions. It may be useful to mention some particulars on which information should be obtained in taking instructions for a will, most of the inquiries being suggested by the various classes of cases discussed at large in this work, and being framed with a view to prevent such questions as those cases present. It will be obvious, that the nature of the inquiries in every case must be greatly regulated by the situation in life and other circumstances of the testator. They may be

distributed into those that relate—*first*, to the subject, and *secondly*, to the objects of testamentary disposition, including in the former some general points.

I. 1. Where lands specifically devised are described by their local situation and occupancy (though a reference to occupancy is in general better omitted, unless it form a necessary discriminating feature in the description,) it should be carefully ascertained, that the whole of the land answering to the locality, answers also to the occupancy, or, in other words, that both parts of the description are *co-extensive, to avoid any question as to the less comprehensive term being restricted.

Description of lands.

2. Where there is an immediate devise to a class of persons, who may not be in existence at the death of the testator, as to the children of A, who may then have no children, it should be ascertained what, in this event, is to become of the intermediate profits. In the absence of any provision of this nature, they will go to the residuary devisee or heir-at-law.

Intermediate profits.

3. Where the subject of devise is a mortgaged estate, inquiry should be made, whether the devisee is to take it [freed from] the mortgage; and, if so, words should be used [distinctly conferring on him the] right to have it exonerated out of the testator's other property. (*a*)

Mortgaged lands.

4. Another question which may be proper, under some circumstances, is, whether any specific fund, constituted of real or personal estate, is to be appropriated for payment of debts, funeral and testamentary expenses, and legacies; and it should always be stated, whether a fund so appropriated, is to exempt the general personal estate from being first applied, as is generally intended, though the intention frequently fails for want of an explicit expression of it.

Payment of debts, legacies, &c.

II. In relation to the *objects* of gift.—When a testator proposes to make a disposition of his property in favor of his wife and children (naturally the first objects of his regard,) several modes of disposition present themselves. One is, to give the income to the wife for life, clothed or not with a trust for the maintenance of the children, and to give the inheritance or capital

Provisions for wife and children.

[(*a*) See 17 and 18 Vict., c. 113, *ante* p. *646.]

to the children equally, subject or not to a power in the wife of fixing their shares, or limiting the property to some in exclusion of others, as she may think proper. Another mode is, to give the wife and children immediate absolute interest in the property in certain proportions, according to the nature of the distribution of personal property under the statute in case of intestacy; but this mode of disposition is less frequently adopted than the former. To empower the widow to regulate the shares, is often found convenient, not only as it preserves her influence over her children, but because it enables her to adapt the disposition of the property to their various exigencies at the period of her death, and it has, moreover, a salutary effect in restraining the children from disposing of their reversionary interests. Where the children do not take absolutely vested interests until their majority or marriage, it is useful to confer a power on the trustees, with the consent of the widow, or other person taking the prior life interest, to advance some proportion (the maximum of which is usually fixed at half or one-third) of their presumptive shares, in order to place out the sons as apprentices, &c., or for other such purposes. Even where the children take vested (*i. e.*, absolutely vested) interests at their birth, a power of advancement may be requisite where the prior legatee for life is a married woman restrained from alienation, and, therefore, incompetent to accelerate the payment of the shares by relinquishing her life interest. In no other case can the power be wanted under such circumstances.

In regard to children, &c.

1. The obvious inquiries (in addition to those immediately suggested by the preceding remarks) to be made of a testator, of whose bounty children are to be objects, are—at what ages their shares are to vest;—whether the income or any portion of it is to be applied for maintenance until the period of vesting, and if not *all* applied, what is to become of the excess? whether, if any child die in the testator's lifetime, or subsequently, before the vesting age, leaving children, such children are to be substituted for the deceased parents. If the vesting of the shares be postponed to the death of a prior tenant for life, or other possible remote period, the necessity for providing for such events is of course more urgent; and in that case it should also be ascertained, whether, if the objects die leaving grandchildren, or more remote issue, but no children, such issue are to stand in the place of their parent.

2. If any of the objects of the gift (whether of real or personal

Daughters' or other females' shares.

property) be females, or the gift be made capable of comprehending them, as in the case of a general devise or bequest to children, it should be suggested, whether their shares are not to be placed out of the power of husbands; *i. e.*, limited to trustees for their separate use for life, subject or not to a restriction on alienation (which, however, is a necessary concomitant to give full effect to the intention of excluding marital influence,) with a power of disposition over the inheritance, or capital, as the case may be; and if it be intended to prevent that power of disposition from being exercised, under marital influence, without the possibility of retraction, it should be confined to dispositions *by will*, which being ambulatory during her life, can never be exercised so as to fetter her power of alienation over the property.

Uses to prevent dower.

3. If the devise be of the legal estate of lands of inheritance to a man, it should be inquired (though the affirmative may be presumed in the absence of instructions) whether they are to be limited to uses to bar the dower of any wife to whom he was married on or before the 1st of January, 1834.

Survivorship.

4. If a gift be made to a plurality of persons, it should be inquired whether they are to take as joint tenants, or tenants in common; or, in other words, whether with or without survivorship; though it is better in general, where survivorship is intended, to make the devisees tenants in common, with an *express* limitation to the survivors, than to create a joint tenancy, which may be severed.

To what period referable.

5. In all cases of limitations to survivors, it should be most clearly and explicitly stated *to what period survivorship is to be referred;* that *is, whether the property is to go to the persons who are survivors at the death of the testator, or at the period of distribution. It should always be anxiously ascertained, that the testator, in disposing of the shares of dying devisees or legatees among surviving or other objects, does not overlook the possible event of their leaving children or other issue. There can be little doubt that in many cases of absolute gifts to survivors, this contingency is lost sight of. This observation, in regard to the unintentional exclusion of issue, applies to all gifts in which it is made a necessary qualification of the objects that they should be living at a prescribed period posterior to the tes-

Suggestion as to clauses of survivorship.

tator's decease, and in respect of whom, therefore, the same caution may be suggested.

6. It may be observed, that where interests not in possession are created, which are intended to be contingent until a given event or period, this should be explicitly stated; as a contrary construction is generally the result of an absence of expression. Explicitness, generally, on the subject of vesting, cannot be too strongly urged on the attention of the framers of wills.

As to vesting.

7. Where a testator proposes to recommend any person to the favorable regard of another whom he has made the object of his bounty, it should be ascertained whether he intends to impose a legal obligation on the devisee or legatee in favor of such person, or to express a wish without conferring a right. In the former case, a clear and definite trust should be created; and in the latter, words negativing such a construction of the testator's expressions should be used. Equivocal language in these cases has given rise to much litigation.

Words of recommendation, &c.

Lastly. It may be suggested, that where a testator is married, and has no children, unless provision be made in his will for children coming *in esse*, or it be unreasonable to contemplate his having issue, the dispositions of his will should be made expressly contingent on his *leaving* no issue surviving him; for, as the birth of children alone is not a revocation, they may be excluded under a will made when their existence was not contemplated; and cases of great hardship of this kind have sometimes arisen from the neglect of testators to make a new disposition of their property at the birth of children; indeed, it has sometimes happened, that a testator has left a child *en ventre*, without being conscious of the fact; for the same reason provisions for the children of a married testator, who has children, should never be confined to children *in esse* at the making of the will. A gift to the testator's children generally will include all possible objects. Where, however, the gift is to the children of *another* person, and it is intended (as it generally is) to include all the children *thereafter to be born*, terms to this effect should be used, unless a prior life interest is given to the parent of such children; in which case, as none can be born after the gift to them vests in possession, which is the period according to the established rule of ascertaining the objects, none can be excluded.

Making will conditional on testator's leaving no issue

*To the preceding suggestions, it may not be useless to add, that it

As to the persons through whom instructions are received.

is in general desirable, that professional gentlemen taking instructions for wills should receive their instructions immediately from the testator himself, rather than from third persons, particularly where such persons are interested. In a case in the Prerogative Court, (*b*) Sir J. Nicholl "admonished professional gentlemen generally, that where instructions for a will are given by a party not being the proposed testator, *a fortiori* where by an interested party, it is their bounden duty to satisfy themselves thoroughly, either in person, or by the instrumentality of some confidential agent, as to the proposed testator's volition and capacity, or in other words, that the instrument expresses the real testamentary intentions of a capable testator, prior to its being executed *de facto* as a will at all."

(*b*) Rogers *v.* Pittis, 1 Add. 46.

THE STATUTE OF WILLS.[1]

1 VICT., CAP. 26.

An Act for the Amendment of the Laws with respect to Wills.
[July 3d, 1837.]

EXPLANATION OF TERMS.

Be it enacted by the Queen's most Excellent Majesty, by and with the consent of the Lords spiritual and temporal, and Commons, in the present parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a

Meaning of certain words in this act.

1. "The power to dispose of property by will," said Judge Gray in Brettun *v.* Fox, 100 Mass. 234, "is neither a natural nor a constitutional right, but depends wholly upon statute and may be conferred, taken away or limited, and regulated in whole or in part by the legislature." Whatever theory we may adopt as to the origin of wills and of the law that governs them, they have become, as regards their execution and probate wholly, and as regards their construction largely, the creatures of statute law.

I. ENGLISH STATUTES.—It is needless to say that no English statute as late as that of Victoria has any validity *as such* in the United States. Many of its provisions, however, are taken from earlier English statutes or have been enacted by American legislatures. In some states force has been given by statute to certain English statutes enacted prior to the Revolution or prior to the settlement of the states. Thus by the charter of Charles II. to William Penn the statutes of 32 Hen. VIII. and 34 and 35 Hen. VIII., above mentioned, were made the law of *Pennsylvania*. Lewis *v.* Maris, 1 Dall. (Pa.) 287. This was done in 1712 by *South Carolina* by an act, (2 Stats. at Large, p. 401,) which enumerates among others the statutes of 27 Hen. VIII., c. 10; 34 and 35 Hen. VIII., c. 5, §§ 14, 15; 29 Car. II., c. 3; 3 and 4 W. & M., c. 14; and 25 Geo. II., c. 6. In *Virginia* a similar provision was contained in the ordinances of convention A. D. 1776, c. 5, § 6, (9 Hen. Stats. at Large 127,) applying to

more confined or different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows: (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature

"WILL."

all English statutes prior to 4 James I. "in aid of the common law and not local in their character." This was repealed in 1792, (Rev. Code, c. 147, p. 291,) and re-enacted in 1873 by the code of that year. (Tit. IX., c. 15, § 2.) In *Missouri* it was provided in 1815, (Pamph. L., p. 32,) that all British statutes prior to 4 James I. "which are of a general nature, not local to the kingdom, which statutes are not repugnant to, or inconsistent with, the constitution of the United States, the constitution of this state or the statute laws in force for the time being, shall be the rule of action and decision" in Missouri. This law was re-enacted in 1855, (R. S. 1020, § 1,) in 1865, (Gen. Stats., p. 558, § 1,) and in 1879, (1 R. S., p. 521, § 3117.) This statute included also the adoption of the English common law, which then took the place of the Spanish law previously governing the territory of Louisiana. In *Illinois* English statutes prior to 4 James I., except 43 Eliz., c. 6, § 2; 13 Eliz., c. 8; and 37 Hen. VIII., c. 9, are declared to be in force. (R. S. 1845, c. 62, § 1.) This act was repealed in 1874. (Rev. Stats., p. 1013.) The same statute appears in *Indiana*. (R. S. 1838, c. 60, p. 398, and 1 Stats. 1870, p. 415.) In *West Virginia* (Code 1868, p. 91, c. 13, § 6,) such English statutes are preserved as were in force in Virginia June 20th, 1863. In *Maryland* in 1809 Chancellor Kilty made report to the legislature of "such English statutes as existed at the time of the first emigration of the people of Maryland, and which before the fourth day of July, 1776, by experience had been found applicable to their local and other circumstances and of such others as have been, since such emigration, made in England or Great Britain and had been introduced, used or practiced by the courts of law or equity in this state." This report was made in compliance with an original resolution passed by the Maryland legislature in 1794, and was afterwards published by legislative authority. Among these statutes is published 29 Car. II., c. 3, but not 27 Hen. VIII., c. 10, or 34 and 35 Hen. VIII., c. 5, both of which had been already substantially made part of the laws of Maryland in 1798. A like list of English statutes in force in *North Carolina* (1 Laws N. C. 17) includes 20 Hen. III., c. 2; 27 Hen. VIII., c. 10; 32 Hen. VIII., c. 1; and 34 and 35 Hen. VIII., c. 5, and in *Georgia* 27 Hen. VIII., c. 10 (Schley 163); 32 Hen. VIII., c. 1 (Sch. 188); 34 and 35 Hen. VIII., c. 5 (Sch. 205); 29 Car. II., c. 3 (Sch. 252); 3 and 4 W. & M., c. 14 (Sch. 282); and 25 Geo. II., c. 6 (Sch. 384.) In the absence of statute giving force to these English statutes or making other provision for the same matter, such statutes as are applicable to our situation and "were in force at the time of the emigration of our ancestors," form part of the common law of all those states which were British territory before the Revolution. Commonwealth *v.* Leach, 1 Mass. 59. But in some states the force of British statutes has been expressly taken away by statute: *Kentucky* (Rev. Stat. 1851, p. 177); *New Jersey* in 1799 (Pat. Rev. 436, § 4; Rev. Stat. 1821, p. 727, §§ 2, 3); and *New York* in 1828 (3 Rev. Stat. 1119, § 3.) See also vol. I., p. 382, note 1, of this work.

II. WHAT LAW GOVERNS, where there is a conflict of laws, is the first question to be determined, and often a difficult one.

of a will in exercise of a power; and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, entitled "An act for taking away the Court of Wards and Liveries, and Ten- 12 Car. II., c. 24.

The following general rules, in the absence of statute, may be considered established:

1st. *Testamentary Capacity.* As to *personal property* the law of the testator's domicile governs, Bremer *v.* Freeman, 10 Moo. P. C. 306 (A. D. 1857); Story Confl. L., §§ 52, 61, 465; Roberts' Will, 8 Paige 525 (1840); Schultz *v.* Dambmann, 3 Bradf. 379 (1855); Price *v.* Dewhurst, 8 Sim. 299, 4 My. & Cr. 76 (1837.) And by that is meant his *last* domicile, Whart. Confl. L., § 569; Story Confl. L., § 69. But if at the time of making a will the testator lacked capacity by his then domicile, the civil law suffered no subsequent change of domicile to give effect to the will, Whart. Confl. L., § 575. The rule preferring the *lex domicilii* to the *lex rei sitæ* in determining testator's capacity to dispose of "movables," has been matter of grave dispute among expounders of the civil law, Whart. Confl. L., § 571, note c. And where the will is in execution of a power, the law of the place of execution of the instrument creating the power governs, Peillon *v.* Brooking, 25 Beav. 218 (1858.) As to *real property* it is claimed by many civil jurists that capacity to dispose of it by will or otherwise, is to be determined by the *lex domicilii*, Story Confl. L., §§ 52, *et seq.*, 432, *et seq.* By the common law, however, it is well settled that the *lex rei sitæ* controls, Story Confl. L., § 431; Whart. Confl. L., § 569.

2d. *Form and Manner of Execution.* As to *personal property* in the absence of statutory provisions, the *lex domicilii* governs, (although this was once warmly disputed,) Story Confl. L., § 465; Sill *v.* Worswick, 1 H. Bl. 690; Countess of Ferraris *v.* Hertford, 3 Curteis 468 (1843); Price *v.* Dewhurst, 8 Sim. 299, 4 My. & Cr. 76 (1837); Kilpatrick *v.* Kilpatrick, 6 B. P. C. Toml. 584, cit. (1787.) And this has long been established as the American rule, Desesbats *v.* Berquier, 1 Binn. 336 (1808); Dixon *v.* Ramsay, 3 Cranch 319 (1806); Mootrie *v.* Hunt, 3 Bradf. 322, 23 N. Y. 394 (1855); Whart. Confl. L., § 585. And has been made so by statute expressly in the *District of Columbia* (1857, Rev. Code, c. 52, § 9); *Kansas* (1855, T. L., c. 164, § 33, or according to Kansas law); *West Virginia* (1868, Code, c. 77, § 5.) For these and other statutes, see *infra.* It was, nevertheless, questioned in England, as late as 1823, whether an Englishman could so *exuere patriam* as to subject his will to the law of a foreign domicile, while failing to conform to the requirements of English law, Curling *v.* Thornton, 2 Add. Eccl. 21. The more recent English cases have adhered to the rule sustaining the law of domicile. And in case of change of domicile after making of will, the law of the last domicile prevails, Whart. Confl. L., 586; Desesbats *v.* Berquier, 1 Binn. 336; Nat *v.* Coons, 10 Mo. 543 (1847); Moultrie *v.* Hunt, 23 N. Y. 394. But in 1861 it was provided by Lord Kingsdown's act, 24 and 25 Vict., c. 114, § 3, that no will shall become revoked or otherwise invalid by reason of any subsequent changes of domicile (and so in N. Y. Laws 1876, p. 93, § 3.) Wills of personal property in execution of a power form an exception to the above rule as to the control of the *lex domicilii*, Tatnall *v.* Hankey, 2 Moo. P. C. 342 (1838); In re Hallyburton, L. R., 1 P. & D. 90 (1866); Van Wert *v.* Benedict, 1 Bradf. 114 (1850.) In Crookenden *v.* Fuller, 1 Sw. & Tr. 441 (1859), the contrary rule

ures *in Capite* and by Knight's Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof," or by virtue of an act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, entitled, "An act for taking away the Court of Wards and

14 and 15 Car. II. (I.)

was held. This case is said to be "incorrect," Wms. Ex'rs (6th Am. ed.) 439, n.

As to *real property* in the absence of statutory provisions, the *lex rei sitæ* controls the form and manner of execution, Coppin *v.* Coppin, 2 P. Wms. 291 (1725); U. S. *v.* Crosby, 7 Cranch 115 (1812); Irwin's Appeal, 33 Conn. 128 (1865.)

As to both real and personal property, questions relating to the execution of a will are governed by the law in force at the time of execution, Price *v.* Brown, 1 Bradf. 291. And this is expressly provided by statute in *Massachusetts* (1838, P. L. 288; 1859, G. S., c. 92, § 7,) and *Rhode Island* (1872, G. S. 374, § 9.)

The rule as to the law governing the execution of wills of personal property, was changed in England by Lord Kingsdown's act in 1861 (see vol. I., p. 13,) which provides that wills of personal property, made by British subjects, shall be valid if executed according to the law either of the testator's domicile or of the place where the will was made, or according to the law then in force in the place of testator's original domicile.

Provision was made at an early day in one or two of the states, for the *admission in evidence* of foreign wills by copy of will and probate. Thus, by act of 1713 in *New Jersey* (Pat. 5; Allin. 28) wills proved in Great Britain or the British Colonies were made provable in this way. In 1759 a similar statute in *South Carolina* (4 Stats. 102) extended the same manner of proof to all foreign probated wills. So in 1815 in *Arkansas* (Comp. L. 556, § 10,) and in 1822 in *Florida* (Laws 1822, p. 52, § 6,) and in 1858 in *Georgia* (Code, § 2398; ed. 1873, § 2432.)

Afterwards provision was made for *recording* foreign wills *as evidence of title* merely. As early as 1807, by the ordinance for the government of the *Territory of Louisiana* (then embracing the states of *Arkansas, Colorado, Iowa, Kansas, Louisiana, Minnesota, Missouri, Nebraska* and *Oregon*, with all the other territory ceded to the United States in 1803,) it was provided that a copy of a foreign probate might be recorded, and should then be "good and available in law for the granting, conveying and assuming of titles," &c. This was re-enacted in *Missouri* in 1808 (1 Terr. L., p. 145, § 30,) 1814 (1 Terr. L., p. 135, § 34,) 1821 (1 T. L., p. 786, § 11,) 1825 (R. L., p. 790, § 11), 1835 (R. S., p. 617, § 20,) 1845 (R. S., p. 1078, §§ 36, 37,) 1855 (R. S., c. 167, §§ 35, 36,) 1865 (G. S., c. 131, §§ 34, 35,) and in 1879 (R. S., c. 71, §§ 3993, 3994.) By the act of 1835 above cited, and subsequent acts, such foreign probate is subjected to contest in Missouri, and by act of 1843 (P. L. 150, § 2,) such acts are extended to the wills of aliens, having been formerly restricted to United States citizens. By laws of *Michigan* in 1809 (P. L. 28, § 62,) a copy of foreign probate might be recorded and thereupon have "the same force and effect as the filing and recording of the original will proved and allowed in the same court." See to same effect Comp. L. 1871, p. 1375, §§ 21–23. So by law of *Kentucky* in 1820 (P. L., p. 112,) re-enacted in 1842 (P. L., p. 21,) with provision as in Michigan statute (*supra*) and subjecting such probate (as in Missouri) to contest in Kentucky. So in *Florida* by act of 1823 (P. L., p. 101, § 9,) re-enacted in 1828 (P. L. 144, § 60); and in *Tennessee*, act of 1823 (P. L., c. 31, § 1,) re-enacted in 1871 (Comp. Stat., § 2184);

Liveries, and Tenures *in Capite* and by Knight's Service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents and hereditaments, whether freehold, customary freehold, tenant-right, customary or copyhold, or of any other tenure, and

"Real estate."

and in *Ohio* by act of 1840 (38 L. 120, § 28,) applying only to wills executed and proved in the United States, and giving them "the same validity in law as wills made in conformity with" the laws of Ohio. This law has been since re-enacted in 1852 (50 L., p. 297, § 26,) 1878 (75 L., p. 838, § 25,) and 1880 (Rev., § 5937.) An earlier act (1839, 37 L. 57,) applied only to wills proved in the United States according to the *lex loci*, and declared such wills to be of "the same validity in law as wills made in conformity with the laws" of Ohio. For similar provisions as to wills executed out of the United States, see act of 1840, *infra*. And in *Iowa* by act of 1843 (P. L. 669, § 15,) applicable only to probates according with the *lex loci*, re-enacted in 1873 (Code, § 2351,) wills might be recorded as evidence; and in *Nebraska* by act of 1855 (P. L. 63, § 60,) re-enacted in 1856 (P. L. 98, § 45,) 1860 (R. S., c. 5, § 22,) 1866 (R. S., c. 14, § 144,) and 1873 (G. S., c. 17, § 144.) And it was further provided by act of 1856 (P. L. 99, § 48,) and the subsequent acts of 1860 (R. S., c. 5, § 24,) 1866 (R. S., c. 14, § 146,) and 1873 (G. S., c. 17, § 148,) that such will and probate "should have the same force and effect as if originally proved and allowed" in Nebraska. A similar act was passed in *Colorado* in 1861 (P. L. 401, § 9,) to be "as good and available" as though made and proved in Colorado. So in 1877 (G. L., § 2814.) In 1864 a provision of the same sort was made in *New York* (P. L. 746), amended in 1878 so as to require satisfactory proofs, and extended in 1872 (P. L. 1627) to future wills; and in 1866 in *New Jersey* (P. L. 826), which act was repealed in 1872 (P. L. 58), revived in 1873 (P. L. 168), and re-enacted in the Revision of 1874 (p. 757, § 26.) So, too, in *California* in 1872 (Code, § 11,322); and in *North Carolina* in 1873 (Bat. Rev., c. 119, § 21,) this act requiring wills serving as evidence of title to real estate to be executed and to appear to be executed according to North Carolina law. In *Wisconsin* the act of 1876 (c. 58, p. 124,) makes a foreign probate, good by the *lex loci* and recorded, "as valid and effectual as evidence of title" as if proved in Wisconsin. See, too, acts of 1877 (P. L. 8 and 92.)

Statutory provision has also been made in nearly all of the states *for proving foreign wills by exemplified copy* of the foreign probate (or in some cases, if no foreign probate is required, by copy of notarial record,) and this is generally by order of court on public notice, and may be accompanied by letters testamentary issued on such new probate. Provision of this sort was made in *Kentucky* as early as 1748 and 1785, re-enacted in 1797 (1 Litt. 611, §§ 13, 14.) The Revision of 1851 and 1852 (c. 106, § 31,) annexes the condition that such will appear to have been executed as a valid will of real property in Kentucky. And to the same effect without the condition in *Massachusetts* in 1785, (1 Laws 246); and see further to like effect, Rev. 1836, §§ 21–23; Gen. Stats. 1859, c. 92, §§ 21–23; 1879, p. 527, by which last act the judge of probate may demand additional evidence as to the probate of a foreign will; and by act of 1878 (P. L. 148), foreign probate is dispensed with in such case, unless made essential by the foreign law. See also the act of 1843, *infra*. So in *Maryland* (Laws of 1785, c. 46, §§ 2–4; 1854, c. 140, Code 1860, § 327,) probate might be made by copy of

whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money,

"Personal estate."

foreign will and probate, and foreign probate is dispensed with (Code 1860, art. 93, § 324; Rev. Code 1878, art. 49, §§ 28, 31,) if not required by foreign law. In *Virginia*, in 1787, (12 Stats. 504), and again in 1832 (P. L. 57), provision was made for the probate of foreign probated wills by copy. This law, as being in force in 1863, was extended to *West Virginia* by act of 1863, p. 136. *New Hampshire* passed a similar act in 1790 (P. L. 257), re-enacted in 1868 (P. L. 131), as to which act see *infra*. So *Vermont* in 1797 (Digested Laws, p. 145, §§ 68, 69,) re-enacted in 1804 (P. L. 126), with the provision that a copy should have the same effect as the original will. See also Comp. Stat. 1851, p. 327, §§ 21–24, and Gen. Stats. 1862, c. 49, §§ 21–24. And see Comp. L. 1821, p. 334, §§ 23, 24. So *North Carolina* in 1802, c. 623, revised in 1821. A distinction was afterwards made (C. C. P., §§ 444, 445; Bat. Rev. 1873, c. 119, §§ 21, 22,) between foreign will of foreigners and of North Carolina citizens, the latter being provable like original wills, by copy of the foreign probate, and the former being only provable when executed according to North Carolina law, and such fact is made to appear in the probate. So *Alabama* in 1806 (Toulm. Dig. 883, § 14—Code 1852, § 1630—Code 1876, § 2313.) The earliest of these acts subjected such probate to contest in Alabama. So probate by copy of foreign probate was provided for in *Ohio* by act of 1808 (6 L. 64, §§ 12, 13,) re-enacted in 1810 (8 L. 146), 1816 (14 L. 141), 1824 (22 L. 119, §§ 11, 12,) and 1831 (29 L. 242, § 14.) These acts, like that of 1839 (37 L. 57), *supra*, contained proviso making them "as good and valid" as wills made in Ohio are declared to be, and also subjected such probate to contest in Ohio. So, too, with like provision as to validity the statutes of *Illinois*, 1819 (P. L. 231, § 23,) 1829 (R. C. 194, § 7,) 1833 (P. L. 614), 1845 (R. S. 538, § 8,) and 1872 (R. S., c. 148, § 9.) So in *Maine* by act of 1821 (P. L. 196), re-enacted in 1871 (P. L. 507), probate might be made on copy of foreign probate. (For provisions as to manner of execution of such foreign will, see *infra*.) So in *New Hampshire*, by act of 1822 (P. L. 10, § 11,) but not as to real property, unless executed according to New Hampshire law. In the later act of 1868 (P. L. 131), it is provided that a will executed in accordance with the foreign law shall have the same effect as if in conformity with New Hampshire law. So in *New Jersey* in 1825 (P. L. 108), and in 1828 (P. L. 204), re-enacted in 1846 (Rev. 361, § 1,) and in 1874 (R. S. 757, § 23,) such record, and the copies thereof, to "have the same force and effect in all courts of law and equity as such record, or copies thereof, would have, if such will had been proved in the usual manner under the laws of this state." So in *Connecticut* by act of 1830 (P. L. 103.) And see 1863, P. L. 7; 1866, G. S. 401, § 2, and 1875, G. S. 368, § 2. In *Pennsylvania* the act of 1832 (P. L. 137), provided similarly for probate and letters testamentary upon copy of foreign probate. In *Indiana* the act of 1829 (P. L. 46, § 33,) required the probate to have been made in accordance with the foreign law. See, too, acts of 1831 (P. L. 273, § 15,) 1838 (Rev. 314, § 15,) 1852 (R. S. 313, §§ 35, 36,) and 1876 (R. S. 578.) And to the same effect in *Tennessee*, the act of 1831 (c. 90, § 12.)

(not being real estates,) debts, choses in action, rights, credits, goods and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or *things as well

Number.

re-enacted in 1858 (Code, § 2182.) And in *Iowa* by act of 1839 (P. L. 471, § 8,) which requires further, that the foreign will be *executed* and proved according to the foreign law, and makes it then "good and available in law in like manner as wills made and executed in this territory." The statute of *Wisconsin* in 1849 (R. S., c. 66, §§ 22-24,) requires the probate to be in accordance with the foreign law, and gives it the "same force and effect as if originally proved" in Wisconsin. So in *Minnesota* (R. S. 1851, c. 53, §§ 22, 24; 1866, Gen. Stats., c. 47, §§ 18, 20.) In *Delaware* probate may be made by copy of foreign will and probate (Rev. Code 1852, p. 272, § 7; same, ed. 1874, p. 508.) So in *Illinois* it was enacted in 1855 (P. L., p. 44; R. S. 1872, c. 148, § 10,) that foreign wills, whether probated abroad or not, might be admitted to probate by copy "in the same manner and upon like proof as if the same had been made, executed and published in this state." And in *Kansas* by act of 1859 (P. L. 646, c. 131, § 20,) re-enacted in 1862 (Comp. L. 903, c. 215,) and in 1865 (P. L. 173, c. 86, § 29,) to "have the same force and effect as if originally proved and allowed" in the same court. So, too, 1868, G. S., c. 117, § 27. The statute of *Arkansas* in 1873 (R. S., § 5784,) requires it to appear in the foreign probate that the foreign will was executed as a valid will of real property in Arkansas. (But see acts of 1838 and 1847, *infra.*) See, too, the statutes of *South Carolina* in 1873 (R. S. 447.) And *Texas* (Pasch. Dig. 1873, § 5517.) And *Georgia*, act of 1874, p. 83, with same provision as Arkansas statute, *supra.*

Statutory provision has also been made in some states as to the law that shall govern the execution of a will. In some it is provided that the execution of all foreign wills shall *be according to the law of the state where the property lies.* This was required by the law of 1823 (P. L. 101, § 9,) in *Florida*, in order to pass title to property in that state. So, too, the act of 1828, p. 144, § 60. (But see act of 1829, *infra.*) So by the act of 1822 in *New Hampshire*, above cited. (And see act of 1868, *supra.*) So in *Maine*, by act of 1821 (P. L. 196); but see acts of 1866, 1869 and 1871, *infra.* So in *Iowa*, the act of 1843 (P. L. 669, §§ 15, 17, above cited,) provides that the probate by copy of foreign probate is not to "make valid any will that is not executed, attested and subscribed in the manner prescribed by the laws of this territory." So in *California*, by act of 1850 (P. L. 179, § 23,) and Code 1872, § 6285. (But see *infra*, Code, §§ 1284, 1324.) And in *Indiana* by acts of 1852 (R. S. 313, § 37,) and 1876 (R. S. 579, § 37,) as to wills executed in Indiana and proved abroad.

In other states, by statute, as at common law, foreign wills must be executed *according to the law where the land lies, in order to pass title to land.* This is now the case in *Missouri*, by acts of 1855, (R. S. 1567, c. 167, § 34,) 1865, (G. S. 528, c. 131, § 33,) 1879, (R. S., c. 71, § 3992); in *Oregon*, by R. S. 1850, § 35; Deady Comp. L. 1855, p. 788; and in *New York*, (Code Civ. Proc. 1880, § 2611.) But these states differ in their law as regards wills of personal property. Thus the law of *New York* originally, by act of 1830, (P. L. 389, amending 1829, R. S., § 68,) required that such wills, executed out of New York state by non-residents, should

as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Gender.

conform to the law of the place of execution. This was changed in 1876 (P. L. 93, § 2,) to a law validating such wills executed in New York, whatever the testator's domicile, and such wills (§ 1) executed out of New York, in the United States, Canada or Great Britain, if executed in conformity with the law of New York, of the domicile, or of the place of execution; and it was further enacted, that change of domicile after execution of the will should not invalidate it. This was again changed by the Code of Civil Procedure in 1880, (§ 2611,) restricting section two above to non-residents, and section one to the law of the place of execution, as in 1830. This act also provided that the construction of wills in questions as to their validity should be governed as to real property by the law of New York, and as to personal property by the law of the testator's domicile. In *Oregon*, wills of personal property may be executed either according to the law of Oregon or law of place of probate (R. S. 1850, § 35; Deady Comp. L. 1855, p. 788.) In *Missouri* the act of 1855, (R. S., c. 167, § 34,) re-enacted in 1865, (G. S., c. 131, § 33,) and in 1879, (R. S., c. 71, § 3992,) simply provides that the execution of wills of real property shall conform to Missouri law, and of personal property to the law of the place of execution.

In many other states statutory provision has been made for giving effect to wills *executed according to the law of the place of execution*. The following statutes are applicable to wills of both real and personal property: In *Delaware*, by acts of 1700 and 1706, wills made out of the province were good if proved within a limited time, and by act of 1749 (p. 449) foreign wills proved in England or the British Colonies were valid, if proved by two witnesses. By the *Louisiana* code in 1825, (art. 1589; ed. 1870, art. 1596,) wills executed according to the *lex loci* were valid. This was also the French law. So by law of *Florida* (1829, § 3); and *Connecticut*, by acts of 1830 (P. L. 303); 1863 (P. L. 7); 1866 (G. S. 401, § 2); and 1875 (G. S. 368, § 2.) In *Missouri*, by act of 1835 (R. S. 617, § 19,) re-enacted in 1845 (R. S. 1078, § 35,) wills made by citizens of the United States, out of Missouri, sufficed to pass title to property, real or personal, in Missouri, if executed and proved either according to the law of Missouri or the law of the place of execution. This has been changed by later statute. (See *supra*.) The same act was passed in *Arkansas* in 1838 (R. S., § 36,) and re-enacted in 1847 (R. S., § 36.) Similarly, in *Ohio*, by act of 1840 (38 L. 120, §§ 29–31,) wills, other than of an alien, executed, proved and allowed *out of the United States*, according to the law of the place of execution, might be proved and recorded and have "the same force and effect" as if originally proved in Ohio. This law was re-enacted in 1852 (50 L. 297, §§ 27–29,) 1878 (75 L. 838, §§ 26–28,) and 1880 (Rev., §§ 5938–5940.) So in *Massachusetts*, by act of 1843 (P. L. 56), wills of inhabitants of other states, executed out of the State of Massachusetts in conformity with the law of the place of execution may be proved in Massachusetts and avail to pass title to property there. To same effect see Gen. Stats., 1859, c. 92, § 8. So in *Kentucky* (R. S. 1851, c. 106, § 8; G. S. 1873, p. 831, c. 113, § 8.) In *Maine*, by act of 1866 (P. L. 27), a will of a Maine citizen executed out of the state and offered for original probate in the state, is valid if executed according to the law of the place of execution. This provision was extended by

REPEAL CLAUSE.

II. And be it further enacted, That an act passed in the thirty-second year of the reign of King Henry the Eighth entitled "The act of Wills, Wards and Primer Seisins, whereby a man may devise two parts of his lands;" and also an act passed in the thirty-fourth and thirty-fifth

Repeal of the statutes of wills, 32 H. VIII., c 1, and 34 and 35 H. VIII., c. 5.

act of 1869 (P. L. 9), to wills originally probated elsewhere. The earlier act of 1821 (P. L. 196), providing for probate by copy of foreign probate, contained a clause that it was not to validate wills not executed by the laws of Maine, nor wills of aliens. This was re enacted in 1871 (P. L. 507), with the further provision for the probate in Maine of wills of Maine citizens, executed abroad in accordance with the law of the place of execution. By the *California* code, § 1284 (repealed in 1874), wills of non-residents executed according to the law of the place of execution are valid. This is now extended by the code of 1872 (§ 11,324) to all wills executed abroad, according to the law of the domicile of California or of the place of execution. In *Wisconsin* in 1878 (R. S., § 2283,) all foreign wills were declared to be ineffectual, unless executed in accordance with the law of Wisconsin or the law of the place of execution.

3d. As to *construction of wills*, it has hardly been disputed that wills of personal property are governed by the *lex domicilii* (see vol. I., p. 2.) Wills of real property, it is said, must be construed by the *lex loci rei sitæ*, vol. I., p. 1; so, too, Whart. Confl. L., § 597; 1 Redf. on Wills 398; but see, *contra*, Story Confl. L. 479, h, and Trotter *v.* Trotter, 3 Wils. & Shaw 407; S. C. 4 Bligh (N. S.) 502, there cited. Both of the above rules are established by statute in New York, Code Civ. Proc. 1880, § 2694. On questions of construction, in case of a change of law, the law in force at the time of the testator's death must govern (vol. I., p. 616); but see Quick *v.* Quick, 6 C. E. Gr. (N. J.) 16.

III. PROBATE.—Formal probate of a will is necessary to give it effect in *Connecticut* (1821, R. S. 209, § 39; 1875, G. S. 368, § 11); *Indiana* (1818, P. L. 149, § 38, but see *infra* provision substituted for this by the Revised Statutes of 1852); *Iowa* (1843, P. L. 672, § 30; 1873, Code, § 2353); *Maine* (1871, R. S. 563, § 15); *Massachusetts* (1859, G. S., c. 92, § 38); *Michigan* (1871, Comp. L., c. 154, § 20); *Minnesota* (1851, R. S., c. 53, § 21; 1866, G. S., c. 47, § 17); *Nebraska* (1855, P. L. 63, § 61; 1873, G. S., c. 17, § 143); *North Carolina* (1873, Bat. Rev., c. 119, § 39); *Ohio* (1808, 6 L. 64, § 8; 1840, 38 L. 120, § 33; 1878, 75 L. 838, § 30; 1880, Rev., § 5942); *South Carolina* (1858, 12 Stats. 597, § 3; 1873, R. S. 446); *Wisconsin* (1878, R. S., § 2294.) Such probate is conclusive evidence as to execution in Iowa (*supra*), Maine (*supra*), Michigan (*supra*), North Carolina (1873, Bat. Rev., c. 119, § 15,) Ohio (except against persons under disability, 1808, 6 L. 64, § 9; 1824, 22 L. 119, § 18; 1878, 75 L. 838, § 21; 1880, Rev., § 5933,) Pennsylvania (1856, P. L. 533, except caveat filed or action brought within five years,) and Wisconsin (*supra.*) In Florida it is conclusive as to personal, and presumptive as to real, property (1828, P. L. 143, § 58.) And a *bona fide* purchaser from testator's heirs can hold against his devisees if the will is not probated within three years in *Indiana* (1852, R. S. 313, § 17; 1876, R. S. 574,) or four years in *New York* (1829, 1 R. S. 748,) and *Ohio* (1852, 50 L. 297, § 52; 1880, Rev., § 5970,) unless the devisee be under disability, in which case the Ohio law gives him two years additional after the

years of the reign of the said King Henry the Eighth, entitled "The bill concerning the Explanation of Wills;" and also an act passed in the parliament of Ireland, in the tenth year of the reign of King Charles the First, entitled "An act how Lands, Tenements, &c., may be disposed by will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an act passed in the twenty-ninth year of the reign of King Charles the Second, entitled "An act for Prevention of Frauds and Perjuries," and of an act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third, entitled "An act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements or hereditaments, or any clause thereof, or to the devise of any estate, *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise or bequest therein; and also so much of an act passed in the fourth and fifth years of the reign of Queen Anne, entitled "An act for the Amendment of the Law and the better advancement of Justice," and of an act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, entitled "An act for the Amendment of the Law and the better Advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an act passed in the fourteenth year of the reign of King George the Second, entitled "An act to amend the Law concerning Common Recoveries, and to explain and amend an act made in the twenty-ninth year of the reign of King Charles the Second, entitled 'An act for Prevention of Frauds and Perjuries,'" as relates to estates *pur autre vie;* and also an act passed in the twenty-fifth year of the reign of King George the Second, entitled "An act for avoiding and putting an end to certain Doubts and Questions relating to the attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty's colonies

10 Car I., secs. 2, c. 2. (I.)

Sects. 5, 6, 12, 19, 20, 21, and 22 of the statute of frauds, 29 Car. II., c. 3; 7 W. III., c. 12, (I.)

Sec. 14 of 4 and 5 Anne, c. 16.

6 Anne, c. 10, (I.)

Sec. 9 of 14 G. II., c. 20.

25 G. II., c. 6, (except as to colonies.)

end of his disability. In Connecticut (*supra*) the statute allows ten years for making probate, and in case of a minor interested, three years additional after attaining his majority. In New York the act last referred to excepts the case of a will concealed by the heirs.

and plantations in America, except so far as relates to his Majesty's colonies and plantations in America;" and also an act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, entitled "An act for the avoiding and putting an end to certain *doubts and questions relating to the Attestation of Wills and Codicils concerning Real Estates;" and also an act passed in the fifty-fifth year of the reign of King George the Third, entitled "An act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates *pur autre vie* to which this act does not extend.

25 G. II., c. 11, (I.)

55 G. III., c. 192.

GENERAL ENABLING CLAUSE.

III. And be it further enacted, That it shall be lawful for every person[2] to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate (*a*) and all personal estate (*b*) which he shall be entitled to,

All property may be disposed of by will;

2. The invention of wills, says Sir H. S. Maine, is to be credited to the Romans; and he adds: "It was at first not a mode of distributing a dead man's goods, but one among several ways of transferring the representation of the household to a new chief. The goods descended no doubt to the heir, but that is only because the government of the family carries with it in its devolution the power of disposing of the common stock." Ancient Law, c. VI., p. 194. That wills are now secret and revocable, and take effect only on the testator's death, is all matter of subsequent growth, p. 212.

The English and American law of devise begins afresh in 1541, in the statute of 32 Hen VIII., for whatever power of devising land had existed in Anglo-Saxon law was lost in the feudal system to spring up again with the fiction of uses, be destroyed once more by the statute of uses, (27 Hen. VIII., c. 10,) and re-established by the statute of wills. So late, indeed, as 1765 Blackstone speaks of wills as "more properly the instruments to convey personal estates." 2 Com. 372. The power of bequeathing personal property he declares to be "coeval with the first rudiments of the law." 2 Com. 491. "But we are not to imagine that this power of bequeathing extended originally to *all* a man's personal estate. On the contrary, Glanvil informs us that by the common law, as it stood in the reign of Henry the Second, a man's goods were to be divided into three equal parts: of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso* if he had no children, the wife was entitled to one moiety and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal." 2 Com. 492. Subject to the testator's debts to the

(*a*) Vol. I., pp. *46, *61, *326, *650.

(*b*) p. *50.

either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or if he became entitled by descent,

crown, which were reserved by *Magna Charta* in 1225, this continued to be the law of England until the time of Charles the First, if not up to the settlement of the North American colonies in the reign of James the Second.

By the statute of 32 Hen. VIII., c. 1, and the explanatory statute of 34 and 35 Hen. VIII., c. 5, the power of devising land by last will in writing was given to all persons, except idiots, infants under the age of twenty-one years, and married women, who were seized in fee either of a sole estate or in coparcenary or in common, in possession, reversion or remainder, to any person except bodies politic and corporate. By this act the law of wills of personal property was not affected. After its passage then, and in contrast to present law, the dying testator had power by writing, unsigned, unwitnessed and informal, to dispose of his lands held in fee, subject to the dower of his wife, but not to his debts, and such power extended only to lands of which he was then seized. Such devise was revocable by parol. Of his personal property he might dispose by parol simply up to one-half or one-third of the whole, as the case might be, subject to debts to the crown and to his individual debts. Personal property might be bequeathed by an infant under the age of twenty-one years, and to a corporate body. Married women could make no legal will, whether of real or personal property. "With regard to devises in general," says Blackstone, "experience soon showed how difficult and hazardous a thing it is even in matters of public utility to depart from the rules of the common law, which are so nicely constructed and so artificially connected together that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law that bare notes in the handwriting of another person were allowed to be good wills within the statute." 2 Com. 376. To remedy this, the act of 29 Car. II., c. 3, was passed in 1678, requiring that a will be signed by the testator or in his presence, and attested by three or more witnesses. For provisions of this statute as to the execution and attestation of wills, see *infra* p. 756, *et seq.* This statute provided also for the devising of estates *pur autre vie.* For comparison of its provisions in this regard with those of 1 Vict., c. 26, § 3, see vol. I. of this work, page 173, *et seq.*

The power to make a will was early recognized in the United States, and has been expressly conferred by statute in most of the states, in some cases wholly unrestricted, in others with various restrictions by reason of dower and homestead rights, rights of "forced heirs," corporate character of devisee, charitable or indefinite character of devise, and incompetency of testator, through idiocy, insanity, alienage, infancy or coverture. The incapacity of testators will be spoken of hereafter under §§ 7 and 8 of the statute of Victoria. Among the earliest American provisions for the making of wills is that of June 7th, 1629, contained in vol. I. N. Y. Col. Doc., p. 553, in section VII. of the "freedoms and exemptions granted by the West India Company to all patroons, masters or private persons who will plant colonies in New Netherland," to the effect that "there shall be granted to all patroons who shall desire the same *venia testandi* or liberty to dispose of their aforesaid heritage by testament." In 1673 (N. Y. Col. MSS.

of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right,

comprising customary freeholds and copyholds without surrender and

XXIII., p. 12,) it was further provided in the "freedoms and exemptions of the several towns in Achter Coll," that the inhabitants of Elizabets Towne, New Worke and Piscattaway, and also of the towns of Woodbridge, Schronsbury and Middletowne, "situate at Achter Coll" should have "the same privileges as native born subjects and Dutch towns * * and be at liberty to dispose of their property by will, according to their pleasure." About the same time provision was made for execution and probate of wills in West New Jersey, (Fundamental Laws 1676, ch. 29, Leaming & Spicer 403,) and in East New Jersey in 1682 (Leaming & Spicer 236.) Among the "acts and orders made and agreed upon at the General Court of Election, held at Portsmouth, on Rhode Island, the 19th, 20th and 21st of May, 1647, for the colony and province of Providence," it is enacted as follows: "Forasmuch as all men are free to dispose of their own as they please, be it enacted by this present assembly that all persons inhabiting in this colony be by this present act put in mind of their own mortality and the distraction to which that they shall leave behind them shall bring to the rightful heir hereof, if not kindly prevented, and that it is ordered, while they are in health and in perfect memory, to set their houses in order, as if they were about to depart, and draw up their wills in writing how their houses, lands, goods and chattels shall be disposed of after their death, and to name an executor or two to whom they will commit the disposal thereof, and so subscribe their names, put to their seals, and cause two or three witnesses to set their hands for confirmation." It may be matter of regret to our legal profession that such paternal orders have not been more generally made and enforced. The power to make a will was expressly conferred by statute in *Massachusetts* in 1641, *Connecticut* in 1650, in the whole *Northwestern Territory* by the northwestern ordinance of 1787, and in the whole *Louisiana Territory* by the Louisiana ordinance of 1807.

It is, however, not to be forgotten that, irrespective of questions of personal incapacity and in the absence of enabling statutes, the restrictions upon testamentary freedom which formed part of the common law at the time of the settlement of the English colonies became for a time, at least, the law in such colonies, while the restrictions of the civil law in like manner found their way into the French and Spanish territory acquired by the United States. The restrictions of the English law have been already referred to. "The view of a will which regards it as conferring a power of diverting property from the family, or of distributing it in such uneven proportions as the fancy or good sense of the testator may dictate, is not older than the latter portion of the middle ages, in which feudalism had completely consolidated itself. When modern jurisprudence first shows itself in the rough, wills are rarely allowed to dispose with absolute freedom of a dead man's assets. * * * Curiously enough the dower of lands proved a more stable institution than the analogous and more ancient reservation of certain shares of personal property to the widow and children." Maine's Ancient Law, pp. 223, 224, chap. VII.

NECESSARY OR FORCED HEIRS were unknown to the English common law, except so far as widows' and children's *rationabiles partes* of the personal estate may have caused them to fill a similar position. These provisions were brushed away in nearly all of the states by the

before admittance, and also such of them as cannot now be devised.

or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, (c) or notwithstanding that being entitled as heir,

earliest statute of wills. In others, however, they were incorporated into, and in some few states they still form part of the statute law in a modified form. One of the earliest statutes of this sort was passed in the State of *Delaware* in 1683 (1 L. App. 16, § 109.) It provided that a decedent's estate, "unless it appear that an equal provision be made elsewhere, shall be thus disposed of, that is to say: one-third to the wife of the party deceased, one-third to the children equally and the other third as he pleaseth, and in case his wife be deceased before him, two-thirds shall go to the children equally and the other third to be disposed of as he shall think fit, his debts being first paid." In *Massachusetts*, as early as 1700 (Laws of Mass. Bay, vol. I., p. 429,) in case of a will made before marriage, the wife might take her share, as in case of intestacy. In 1703 it was enacted in *South Carolina* (2 Stats. 226) that a gift to a bastard child exceeding one-tenth of testator's whole estate or £100, and disinheriting any legitimate child, should be void. The present statute (1873, R. S. 442, § 14,) avoids only gifts to a bastard child or concubine of more than one-fourth of testator's estate. In *Virginia* the statute of 1748 (5 Stats. 447, c. 3, § 11,) permitted the testator to will away from his wife (surviving him) only one-half of his property, or if she and one or two children were left, only one-third, and gave the wife a child's share of the personal property, if there were more than two children, with right to dissent from the will by deed and in court within nine months after testator's death. See also act of 1785 (12 Stats. 146, § 25,) and Rev. Code of 1873 (c. 119, § 10.) In *Florida* the act of 1823 (p. 101, § 9,) saved rights vested by pre-existing Spanish laws, now, no doubt, nearly or quite extinguished. In *Louisiana* the code of 1825 (ed. 1870, §§ 1617–1624,) establishes "forced heirs" as by civil law, allowing them to be disinherited only for cause expressed in the will and proved by the heir. It also provided (§ 1493) that donations should not exceed two-thirds of testator's estate if he left one legitimate child, one-half if two legitimate children, one-third if three or more, two thirds if no children but father or mother surviving. A law of the republic of *Texas* in 1837 (p. 106) provided that only legitimate descendants should be forced heirs. In 1840 (p. 167, § 13,) a state law forbade a father or mother, by will, to "disinherit his or her child or children for any cause, except for personal violence committed by such child or children, on the testator or testatrix, at any time after such child or children shall have arrived at the age of sixteen years, or for the attempt of such child or children, at any time after arriving at said age, to slander or defame the said testator or testatrix by imputing to them, or either of them, offences punishable by law or ascribing to them, or either of them, acts calculated to bring them, or either of them, into disrepute and disgrace in the community," the cause to be stated in the will and proved true by the heir, if demanded by such disinherited child within four years after probate. This law was repealed in 1856 (p. 5), and has not been re-enacted. The act of 1840 (§ 15) only permitted a parent to dispose freely of one-fourth of his estate.

As to the rights of a wife both to real and personal property, see *infra*, under the head of Dower.

DOWER, as at common law, was early

(c) Vol. I., pp. *60, *664.

devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, (*d*) or notwithstanding that the same in consequence of the want of a custom to devise or surrender to the use of a will or

recognized in nearly all of the states that were English colonies as a principle of their law, although formal legislation giving such right of dower followed at a much later period in some states, and is wanting altogether in others. In *Louisiana* there has never been such right, and in *Nevada* both dower and curtesy were done away by Comp. L. 1862, c. 61, § 157. So in *California* in 1850 (p. 813, § 10,) and in *Texas* in 1840 (Hartley's Dig., p. 285,) repealing dower act of 1839 (Id., §§ 861-868.) In *Virginia* provision was made in 1606 (1 Hen. Stats. at Large 67), that land be inherited and enjoyed as under the laws of England, and in 1664 (2 Hen. Stats. at Large 212), an act was passed establishing the right of dower as at common law. This was one of the earliest American statutes of the kind. To this was added, in 1673, a widow's right to one-third of the husband's personal property, or if he left more than two children, a child's share; re-enacted in 1748 (5 Stats. at Large, p. 447, § 11,) and by act of 1785 (12 Stats. at Large, p. 146, § 25,) this was enlarged to one-half in the former and one-third in the latter case. So Code, c. 119, § 10. The right of dower is reserved in the wills act of 1785 (12 Stats. 140, c. 61, § 2,) and that of 1792 (§ 2), and the widow is allowed for her election one year after testator's death (Laws of 1792, p. 92, § 25.) See also act of 1785, *supra*, § 21, and Laws of 1852, p. 80, changing the time to one year after probate. In *Massachusetts* the first American dower act was passed in 1641 (Anc. Law and Charter of Mass. Bay 99), giving dower as at common law. In 1783 (1 Laws 94, c. 24, § 8,) she was required to make election between her dower and the provision for her in her husband's will, and was deemed to have accepted the will unless she filed her written waiver in six months after probate (R. S. 1836; G. S. 1859, p. 475, c. 92, § 24; G. S. 1861, c. 164,) changed in 1873 (P. L. 519), to six months after termination of contest on will, if any. In *Connecticut* the right of dower as at common law was given in 1672 (Stats. 1796, p. 146, § 1,) and remained the law (R. S. 1849, p. 276) until changed by Comp. L. 1854, p. 382, so as to apply thenceforth only to real property of which the husband died seized. The common law right of dower was recognized by statute as existing in *New Jersey* as early as 1682; in *New York* in 1683, "Charter of Libertys" (2 Laws App., No. II, p. 5); in *South Carolina* in 1698 (2 Stats., p. 137); in *New Hampshire* in 1714 (Laws, ed. 1771, c. 26, p. 37); in *North Carolina* in 1715 (1 Laws 104, c. 7); in *Georgia* in 1768 (Prince's Laws, p. 111, § 3); in *Kentucky* in 1785 (1 Litt. 611); in *Ohio* and the other western states carved out of the northwestern territory by the congressional ordinance of 1787; and in *Missouri* by the act of 1807, abolishing the Spanish laws.

The common law right of dower first became a statutory right in *Delaware* in 1693 (1 Laws App., p. 20, § 14,) subject, however, both to debts and to adverse disposal by will. The latter of these qualifications was done away in 1697 (1 Laws App., p. 24, § 4,) and the former in 1816 (Rev. 1829, p. 167.) By the Revised Code 1852, § 1744, a devise to the widow is presumably in lieu of dower, and puts her to an election. In such case she takes her dower as at common law if there are children; if none, one-half the real estate for life, and if no next of kin, the

(*d*) Vol. I., p. *60.

otherwise, could not at law have been disposed of by will if this act had not been made, (e) or notwithstanding that the same in consequence of there being a custom that a will or a surrender to the use of

whole real estate for life (Rev. Code, c. 85, § 1675.) In *South Carolina* by the act of 1712 (2 Stats., pp. 401–413,) the English common law was adopted as part of the law of the province. In 1779 common law dower was made statutory in *Vermont* (State Papers 360.) The act of 1799 (p. 3) put the widow to an election between any testamentary provision and her dower right, together with one-third of the personal property. See Laws of 1818, ch. 6; Comp. Stats. 1851, p. 363, § 6; G. S. 1862, c. 49, § 6; R. S., c. 45, p. 288; Laws of 1864, p. 74. In 1784 (1 Pub. Acts 353, c. 22, § 8,) common law dower was established by statute in *North Carolina* (then embracing *Tennessee*), and the widow was put to her election, and required to file a formal dissent within six months after probate. Until this act a devise to the widow could only bar her dower by being expressly given in lieu of it, Reid *v.* Campbell, Meigs 378. By act of 1784, c. 204, applicable to both states, the widow took, in addition to her dower, one-third of the personal property, or if there were more than two children, a child's share. See, too, Code N. C. 1855, p. 601, § 1, and Code Tenn. 1858, p. 473, § 3. As to Tennessee, see also acts of 1813, c. 119; 1857, p. 60, c. 3, § 1; 1871, Comp. Stat., §§ 2404–2404 a. By the acts of 1859 and 1871 the widow electing not to take under the will takes also a share of the personal property—one-third, if not more than two children—otherwise a child's share. In 1787 (1 Laws N. Y., p. 56, § 1,) dower was established in *New York* as at common law and so remains (1 Stats. at Large, Edm. ed., 691.) So common law dower was established by statute in *Kentucky* in 1796 (1 Litt. 516,) and reserved from testamentary disposition in 1822 (2 Stats. 1242.) By the earlier act of 1785 (1 Litt. 611, § 24,) the widow might elect within one year after testator's death to take her dower, one-third of the slaves and her share of personal property, as though her husband had died intestate. In *Rhode Island* in 1798 (Laws of 1822, p. 188, § 1,) dower was fixed as at common law. Both dower and curtesy exist in Rhode Island, and the widow is required to elect between her dower and the provisions of a will written one year after probate (R. S. 1857, p. 356, § 9.) In *New Jersey* by act of 1799 (Pat. Rev. 343; 1874, R. S. 320, § 1,) similar provision was made for dower and (§ 16) election by widow. In *Ohio* by act of 1804 (1 Chase 395), the widow was to have for her dower a life estate in one-third of the real property, as at common law, and a third of the personal property, subject to debts. By act of 1805 (1 Chase 472, § 3,) she was required to elect between provisions of will and dower. By act of 1816 (14 L. 141, § 2,) such election was to be made within six months. So in 1840 (38 L. 120, §§ 45–46,) taking dower and personal property, as above, or the provisions of the will, unless intention appear in the will to give her both. So acts of 1852 (50 L. 297, §§ 43, 44,) 1858 (55 L. 36), extending time to one year; 1878 (75 L 838, §§ 51, 52,) and 1880 (Rev., §§ 5963, 5964.) By act of 1860 (57 L. 30) the court was required to make the widow acquainted with her rights before election by her. By the wills act of 1808, (6 L. 64, § 2,) re-enacted in 1810, (8 L. 146,) and 1816, (14 L. 141,) dower right is reserved from testamentary disposition, and by act of 1852 (*supra*, § 46,) and 1880, (Rev., § 5966) election may be made by the court for a widow incapacitated by in-

(e) Vol. I., p. *60.

a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and

sanity, &c. An earlier provision had been made in 1795 (1 Chase 187) for election prior to the first statute of dower above mentioned. Similar dower acts have been passed in *New Hampshire* in 1804 (Laws 1830, p. 538, §§ 1–7—restricted to real property of which the husband died seized, by Comp. L. 1853, c. 175, § 3); and for widow's election by act of 1822, p. 10, § 2; 1878, G. S., § 13; *Mississippi* in 1812 (Rev. Code, 230; enlarged in 1821, R. C. 32, § 14; 50, § 81, to one-half if no children and husband solvent; R. C. 1857, p. 337); and for widow's election in six months after probate (R. C. 1871, § 1281;) *Missouri* in 1815, (1 T. L. 418), subject, however, to prior execution sales, and in 1817 subject to debts. This was changed in 1845 (R. S. 429, c. 4, §§ 1–6) Every devise to the wife, unless otherwise expressed, was in lieu of dower (1807, 1 T. L. 155, § 54; 1825, R. S. 333, § 4; 1835, R. S. 228, § 9; 1845, R. S. 430, § 10; 1855, R. S. 668, § 15; 1865, G. S., c. 130; 1879, R. S., c. 29, § 2199.) The widow was obliged to elect by written renunciation of the will in twelve months after probate (1807, *supra*, § 54; 1825, *supra;* 1835, *supra*, § 6, six months; 1845, *supra*, § 11, twelve months; 1855, *supra*, § 16; 1865, *supra;* 1879, *supra*, § 2200.) These provisions were superadded to that of 1821, (§ 4) which gave the widow her intestate share of real and personal property, if left wholly unprovided for by her husband's will. If the husband left no child, the widow takes her separate property and one-half of testator's real and personal property at his death, after payment of debts (1825, R. S. 332, § 1; 1835, R. S. 228, §§ 3, 5; 1845, R. S. 430, §§ 3, 5; 1855, R. S., c. 56, §§ 5, 7; 1865, G. S., c. 130, §§ 3, 5; 1879, R. S., § 2190)—if only children by a former wife, her separate property subject to the husband's debts, in addition to the share below given if children left, (1835, *supra;* 1845, *supra*, §§ 4, 5; 1855, *supra*, §§ 6, 7; 1865, *supra*, §§ 5, 6; 1879, R. S., §§ 2190, 2191)—if other children, one-third of husband's real property and slaves for life, and one-third of his personal property absolutely subject to debts (1835, *supra*, § 2; 1845, *supra*, § 2, or a child's share; 1855, *supra*, § 4; 1865, *supra*, § 4; 1879, *supra*, § 2189.) Further, if there were no children, she might elect to take one-third of the real property absolutely, discharged from debts, or her separate property and one-half of all other property absolutely, subject to debts (1845, *supra*, § 6; 1855, *supra*, § 11; 1865, *supra*, § 11; 1879, *supra*, § 2195.) So, too, in *Maine*, in 1821 (c. 40, § 6,) with right to elect dower and intestate share of personal property against testamentary provisions, (1835, p. 280,) such election to be made within six months after probate (1871, p. 757;) *Florida* in 1822, with right of election (Laws 1824–5, p. 55, § 1;) *Alabama* in 1823, (p. 258, c. 1; enlarged to one-half, if no children and husband solvent, p. 886, § 17,) election by the widow being provided for as early as 1806, (Toulm. Dig. 883, § 11,) unless there be plain intention of testator that widow should take both provision and dower. By act of 1812, (Toulm. Dig. 258, § 1,) she was required to file her dissent with the court within one year after probate, and by the code (1852, §§ 1609, 1610 and 1876, §§ 2292, 2293,) she took with her dower an intestate share of the personal property in case of dissent. So, too, in *Indiana* in 1824 (Laws 157, c. 33, § 1; R. S. 1838, c. 29, § 12.) In 1852, (1 R. S., c. 27, § 16,) the right of dower was abolished and in its stead the widow (§ 17) was to take in fee one-third of the real property

estates pur autre vie; also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or

at his death or if it should exceed $10,000, one-quarter, and if it should exceed $20,000, one-half, and (by § 35; R. S. 1876, p. 415, § 41,) the widow has her election between the will and one-third of her husband's property at his death, in fee. So, too, in *Georgia* in 1826 (Cobb 171) in the real property only, of which the husband died seized. Before this by act of 1807 (Prince's Laws 167) the widow was required to elect in one year after testator's death between the provisions of his will and her dower at common law, and in default of an election took the latter. So, too, in *Illinois* in 1827, (Purp. Dig., 1st ed., 414; R. L. 1833, p. 236,) it being further provided in 1829 R. L. 204, § 39; R. L. 1833, p. 624, that a devise to a wife should be in lieu of dower unless otherwise expressed, and that the widow should within six months (afterwards twelve months, 1843, p. 419,) make election in writing by renouncing the provision of the will or be presumed to have accepted it, (Id., § 40; 1843, p. 419,) and in case of election against the will she should have beside her dower in the real estate one-third of the personal property subject to debts. So, too, in *Arkansas* in 1838 (Dig. Stat. 1858, c. 60, § 450;) *Michigan* in 1838, (R. S. 262, c. 2, § 1; 1857, Comp. L. 850, c. 89,) and it was provided by the territorial wills act of 1811 (1 T. L. 160, § 2,) that the widow's right to one-third of the real property for life and of the personal property absolutely should not be subject to the disposition of the husband. So, too, in *Iowa* in 1839 (p. 484, § 41; repealed in 1843, R. L. 725, and re-enacted in 1845, c. 21, § 6.) This was enlarged to an estate in fee by the Code of 1851, § 1394, but restored to the common law life estate in 1853 (c. 61, p. 97; Rev. 1860, § 2477.) It was also provided in 1839 (*supra*, §§ 39, 41,) that every devise or bequest to the widow should be in lieu of dower, unless otherwise expressed, and that the widow should make her election by written renunciation of the will within six months after probate, and should in such case take one-third of the real property for life and one-third of the personal property absolutely. So, too, in *Wisconsin* in 1849 (R. S. 333, c. 62; 1858, R. S., c. 89, p. 545;) *Minnesota* in 1851 (c. 49, p. 217; 1858, c. 36, p. 407,) the widow being put to her election unless contrary intention of testator appear (1851, R. S., c. 49, § 18; 1866, G. S., c. 48, § 18; repealed in 1875, c. 40, § 5.) By 1876, G. S. c. 37, § 3, one-third of the real estate of either was given to the surviving husband or wife "free from any testamentary or other disposition thereof to which such survivor shall not have assented in writing," subject, however, to debts. So, too, in *Oregon* in 1855 (p. 404, c. 1,) the widow being put to her election by any devise, in which a contrary intention does not appear, and being presumed to have elected under the will unless written renunciation is filed within one year after probate (Deady 586, §§ 18, 19.) So, too, in *Kansas* in 1855 (T. L., c. 63, p. 314, § 1; 1862, Comp. L. 478, c. 83, § 1,) changed to half the real property in fee, inclusive of homestead rights and subject to debts and prior execution sales, in 1859, (p. 381, c. 63, § 5,) but restored to its original character by repeal of this act in 1865 (p. 187, c. 86, § 81.) It was further provided by the acts of 1855 and 1862, *supra*, (§§ 2, 3,) that if there were children left, the widow should take one-third of the slaves and personal property absolutely, and if no children, one-half of all property absolutely, in either case subject to debts, the widow to make election by written renunciation of the will within twelve months (*supra*, § 11; 1859,

copyhold, of of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; (*f*) [3] and also to all contingent, executory, or other future interests in any

contingent interests;

supra, § 15; 1865, *supra*, § 44, after explanation of her rights by the court; 1868, G. S., c. 117, § 42.) The act of 1859 gave like rights to both husband and wife, the husband to make his election (§ 29) in the same manner as the wife. So, too, in *Nebraska* in 1855, (p. 75, § 185, applicable alike to husband and wife and independent (p. 74, § 171,) of testamentary provision, the widow being put to her election unless a contrary intention appear in the husband's will, (1856, c. 44, § 17; 1861, p. 61, § 18; 1866, R. S., p. 59, § 17; 1873, G. S. 279, § 17,) and election to take the devise being presumed if she fail to disclaim it within one year (1856, 1866 and 1873, *supra*, § 18; 1861, *supra*, § 19.)

Dower as at common law has existed independently of statute in *Maryland*, *Pennsylvania* and *Colorado*. In *Maryland* it was enacted in 1798 (c. 101, ch. 13, § 1,) that a devise to a widow should bar her dower, unless renounced within ninety days after probate, (extended to six months by act of 1831, c. 315, § 2.) In such case she was entitled to a third part also of the personal estate, after payment of debts. This act is applicable to the *District of Columbia*, (as to which see 1816, Code 79, § 80; 1859, Rev. Code, c. 52, § 4.) So in *Pennsylvania*, (act of 1833, p. 249, § 11; Purdon's Dig., 1872, p. 1474,) the widow taking also her intestate share of the personal property, (act of 1833, § 13; Laws 1848, p. 537, § 11,) if she renounce the testamentary provision. So in the *District of Columbia*, (Code 1816, p. 79, § 80; Rev. Code, c. 49, §§ 17, 18; c. 58, § 38.) In *Colorado* a devise bars dower in the same way, (Laws 1861, p. 364, § 8,) but her election against the will entitles her to one-half of both real and personal property, (Laws 1861, p. 153, § 9; 1867, R. S., c. 60, § 5.) It is thus seen that in every state in the Union except *California*, *Louisiana*, *Nevada* and *Texas*, the widow's right of dower is provided for by statute, and in many of the states an additional

(*f*) Vol. I., p. *62.

3. Estates *pur autre vie* were not devisable under the statute of 34 and 35 Henry VIII., and first became so in 1677, by the statute of frauds, 29 Car. II., c. 3, § 12. This statute has been enacted in whole or in part in *Alabama* (1806, Toulm. Dig. 883, § 2; 1852, Code, § 1589; 1876, Code, § 2274); *Indiana* (1831, R. S. 274, § 18; 1838, R. S. 315, § 18; 1852, R. S. 308, § 1; 1876, R. S. 571, § 2); *Maine* (1821, P. L. 137, § 1; 1871, R. S. 563, § 1); *Massachusetts* (1784, 1 L. 109, § 1; and see 1859, G. S., c. 92, § 1); *Michigan* (1809, 2 T. L. 13, § 1; and see 1871, 2 Comp. L., § 4322); *New Jersey* (1795, Pat. Rev. 189, § 1; 1874, Rev. 1243, § 1); *New York* (1787, 1 Greenl. 386, § 4; 1829, 2 R. S. 56, § 2); *Pennsylvania* (1833, P. L. 249, § 1; Purd. Dig., ed. 1872, p. 1474, § 1); *Rhode Island* (1872, G. S., c. 171, § 1); *South Carolina* (1873, R. S. 442, § 3); *Texas* (1840, P. L. 167, § 2); *Vermont*, (1797, Dig. L. 119, § 1; 1821, C. L. 334, § 16; 1851, C. S. 327, § 1; 1862, G. S., c. 49, § 1); *Virginia* (1785, 12 Stats. at Large 152, § 51; 1792, 10 Id. 97, § 54; now enlarged to "every interest.") In many other states, if not in all, estates *pur autre vie*, although not expressly mentioned in the words of the statute, are made devisable by reason of more comprehensive words embracing them with other estates and interests, *e. g.*, "all his estate," "all his property," "every interest therein," "every estate, right, title and interest," "every interest that can descend to heirs or be conveyed by deed," &c. As to these and other expressions see note 4, *infra*.

real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto

right to a share of the personal estate is given to her by statute, and put out of reach of testamentary dispositions by her husband.

HOMESTEAD. About the year 1850, or soon after that time, homestead laws were enacted in nearly all of the states. Many of these statutes make void any mortgage, encumbrance or alienation without the joint execution and acknowledgment of the wife. A devise by the husband has been held to fall within the meaning of such statute, Brettun *v.* Fox, 100 Mass. 234. Such are the statutes of *Alabama*, (Code, ed. 1876, § 2822); *Arkansas*, (Gantt's Dig., ed. 1874, § 2623); *California*, (Civil Code, § 6242); *Florida*, (Const. 1868, art. IX., § 1); *Georgia*, (Code, ed. 1873, § 2025); *Iowa*, (Rev. Code, ed. 1880, § 1990); *Kansas*, (Const. 1859, art. XV., § 9); *Michigan*, (Const. 1850, art. XVI., § 2; Comp. L. 1871, c. 193, § 2); *Minnesota*, (1878, G. S., c. 68, § 1); *Missouri*, (Laws 1873, p. 16; R. S. 1879, c. 39, § 2689); *Nevada*, (Comp. L. 1862, c. 61, § 160); *New Hampshire*, (Laws 1851, p. 1089; G. L. 1868, c. 138, §§ 2, 3); *New Jersey*, (1852, p. 222; Rev. 1874, p. 1055, § 59); *Tennessee*, (Stats. 1871, § 2114 a); *Texas*, (Const., art. XVI., § 50); *Vermont*, (R. S., c. 68, § 10); *Virginia*, (Code 1873, c. 183, § 7.) Other statutes require only that the wife join in a *sale: Texas*, (Const., art. XVI., § 50); or *mortgage: Colorado*, (G. L. 1877, c. 46, § 1348;) *Ohio*, (R. S. 1880, § 5442; 1849, 48 L., 29, § 9); or either: *Indiana*, (2 R. S. 1852, p. 336, § 3); or in a *release* or *waiver* of the exemption, *Kentucky*, (G. S., c. 38, § 13); *Minnesota*, (Stats. 1851, c. 71, § 93); *New York*, (3 R. S., ed. 1875, p. 627, § 32.) Others exempt expressly from conveyance or devise: *Illinois*, (Stats. 1878, c. 52, § 1); *Massachusetts*, (G. S., c. 104, § 1); *South Carolina*, (1873, R. S., c. 96, § 5; 1868, 14 L. 20, § 4); or make *devises subject to* the right of homestead: *Iowa*, (Code, ed. 1873, § 2322); *Nebraska*, (1855, p. 63, § 41.) In others the exemption is merely from execution or attachment, and does not affect the devisability of the property. In *Wisconsin* it is provided by 1878 R. S., c. 103, § 2280, that the devisee shall take free of all except mortgage and judgment debts, (Laws 1864, p. 343.)

CORPORATIONS were expressly excepted from the statutes of 32 and 34 and 35 Hen. VIII., and became thereby incapable of taking by devise. This incapacity, which had not existed at common law, (Co. Lit. 26), was done away by the statute of charitable uses, (43 Eliz, c. 4, A. D. 1601,) as regards gifts for various purposes therein enumerated as *charitable*. For similar American statutes and application of this English statute in America, see vol. I., p. 382, note 1; also 180, note 1. The subsequent mortmain act of 9 Geo. II., c. 36, passed in 1736, was never held to apply to the American colonies, vol. I., p. 386, note. The earliest American statute of this sort is that of *South Carolina* in 1733 (2 Stats. at Large 341, § 1.) See, too, acts of 1789 (5 Stats. at Large 106, § 2,) and 1873 (R. S. 442, § 1.) Soon after this came the statute of *New York*, in 1787 (1 Greenl. 386; re-enacted in 1813, 1 R. L. 364, and in the revised statutes of 1829–30, 2 R. S. 56, § 3.) This act prohibits devises of land to corporations, unless expressly authorized by statute to take. Under this act the courts of New York have held the U. S. government incapable of taking, as being neither a person nor a corporation authorized to take by N. Y. statute, In matter of Fox, 52 N. Y. 530; so, too, a foreign corporation, White *v.* Howard, 46 N. Y. 144;

under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; (*g*) and also to all rights of entry for conditions broken, and other rights of entry; (*h*) [4] and also to such of the

rights of entry; and property acquired after

but see Chamberlain *v.* Chamberlain, 43 N. Y. 424, and Sherwood *v.* American Bible Soc., 1 Keyes 561, to the effect that a foreign corporation may take a bequest of personal property. So in *California*, (Code, ed. 1872, § 6275,) corporations "other than scientific, literary or educational," or expressly authorized by statute, are made incapable of taking by devise. So in *Nebraska*, (Laws 1856, c. 37, § 4,) a devise to a corporation is made valid only if authorized by statute; and in *Alabama* (Code of 1852, § 1590; ed. 1876, § 2275.) In *Tennessee*, (C. S. 1871, § 1472,) a corporation may take property not exceeding in value $50,000; and in *New Jersey*, (Rev. 1874, p. 177,) "not exceeding the amount limited in its charter;" religious societies being limited "to an amount in value not exceeding $2000 a year" (Rev. 1874, p. 958.)

In many of the states special provision is made as to gifts for *charitable* purposes, or to corporations of a religious or charitable character. As to these statutes see vol. I., pp. 389, 390. In *California* the Code (ed. 1874, § 6313,) forbids all such gifts in excess of one-third of testator's estate; so in *Georgia* (Code 1858, § 2384; 1873, § 2419,) if testator leave wife or child. In *New York* (2 R. S. 58, § 4,) such gift must not exceed one-half of testator's estate, if he leave wife, child or parent. In *Colorado* (G. S. 1877, § 235,) "domestic and foreign religious, educational and charitable and literary corporations or associations" may take by devise. And in *Kentucky* (G. S. 1877, c.

(*g*) Vol. I., p. *47.

(*h*) Vol. I., p. *50.

4. Executory and contingent interests were devisable at common law prior to the statute of 1 Vict., (see vol. I., p. 149, *et seq.*,) if descendible or transmissible. So, too, were equitable interests (vol. I., p. 157.) Both of these classes of interest are chiefly affected by the statute of 1 Vict., as it extends them to interests and estates acquired subsequently to the making of the will. Rights of entry, however, being of the nature of rights of action and unaccompanied by possession, were not devisable at common law. In *Alabama* any interest in land descendible to heirs is made devisable (1806 Toulm. Dig. 883, § 2; 1852, Code, § 1589; 1876, Code, § 2274.) So, too, in *California* (1872, Code, § 6274;) and in *District of Columbia*, except estates tail (1857, Rev. Code, c. 52, § 2;) *Indiana* (1876, R. S. 570, § 1); and *Kentucky* (1851, R. S., c. 106, § 2; 1873, G. S., c. 113, § 2, and p. 585, § 6,) notwithstanding adverse possession (1851, R. S., c. 12, § 2.) So in *Maryland*, except estates tail (1798, c. 10, § 1; 1860, Code, art. 93, § 298; 1878, Rev. Code, art. 49, § 1); and *Michigan* (1871, 2 Comp. L., § 4322); and *Minnesota* (1851, R. S., c. 53, § 1; 1866, G. S., c. 47, § 1.) So, too, *Nebraska*, (1866, R. S., c. 14, § 123; 1873, G. S., c. 17, § 123); and *New York* (1829, 2 R. S., 6th ed., 56, § 2.) So *North Carolina*, (1873, Bat. Rev., c. 119, § 5,) expressly including rights of entry and contingent estates; and *West Virginia* (1868, Code, c. 77, § 1.) In *Colorado* all testator's "estate, right, title, and interest in possession, remainder or reversion" in property of "every description," is subject to devise (1861, P. L. 398, § 1; 1867, R. S., c. 90, § 1; 1877, G. S., § 2788.) So in *Florida* (1828, P. L. 141, § 51.) So in *Illinois* (1829, Rev. Code 191, § 1; 1845, R. S. 536, § 1; 1872, R. S., c. 148, § 1.) So in *Missouri* until 1835 (1807, 1 T. L. 131, § 18; 1825, R. L.

same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the *time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will. (*i*). 5

execution of the will.

13, § 1,) gifts for various charitable purposes are made valid. So in *Rhode Island* by act of 1721 (R. S. 1844.) So in *Virginia* (1841, P. L. 54; 1873, Code, p. 668,) for literary and educational purposes; and in *West Virginia* (1868, Code, c. 57, § 1,) for religious worship; while in *Mississippi* (Rev. Code 1871, §§ 2440, 2441), all such gifts are made void. And in *Missouri* religious corporations are prohibited by the constitution (art. XIII., § 5.) In *California* the code (ed. 1876, § 6313,) avoids gifts to charitable or benevolent societies or for charitable uses, unless executed at least thirty days before testator's death. So in *Georgia* (Code 1858, § 2384; 1873, § 2419,) unless executed ninety days before testator's death. So in *Michigan* (Comp. L., § 2009,) unless executed two months before testator's death. So in *Pennsylvania* (1855, P. L. 332; 1871, R. S. 190, § 11,) unless executed one month before testator's death. So unless executed twelve months before his death in *Ohio* (4 Sayler Stat. 3361, § 17; 72 L. 1874, p. 3; 75 L. 1878, p. 838, § 3; Rev. 1880, § 5915,) and otherwise to be void if he leave child, adopted child or legal representative. But in *Delaware* such gift must be by irrevocable deed, executed one year before

790, § 1.) For present law see *infra*. So in *Connecticut* "their estate" (1784, Rev. Code, p. 3; 1821, 1 R. S. 199, § 1; 1866, G. S. 401, § 1); and in *Georgia*, his "entire estate" (1858, Code, § 2364; 1873, Code, § 2399); and in *Iowa* all his property (1843, P. L. 666, § 1; Code, ed. 1873, § 2322); and in *Nevada* "all his estate" (1862, Comp. L., c. 61, § 1; ed. 1873, vol. I., p. 199.) In *Oregon* all his interest and estate (1850, G. S. 274, § 1.) In *Arkansas* the testator may devise his land "and all estate therein" (1847, R. S., c. 179, § 1; 1873, R. S., § 5760.) So in *Indiana* (1852, R. S. 308, § 2; 1876, R. S. 571, § 2.) In *Kansas* property of every description "and all interest therein" (1855, T. L., c. 164, § 1; 1868, G. S., c. 86, § 1; ed. 1878, § 6113.) So in *Missouri* (1835, R. S. 617, § 1; 1845, R. S. 1078, § 1; 1855, R. S., c. 167, § 1; 1865, G. S., c. 131, § 1; 1879, R. S., § 3960.) So in *New Hampshire* his estate "and any interest therein" (1842, R. S. 156, § 1; 1853, C. S., 165, § 1; 1867, G. S., 174, § 1; 1878, G. L., c. 193, § 1); and *Ohio* (1824, 22 L. 119, § 1; 1840, 38 L. 120, § 1; 1852, 50 L. 297, § 1; 1880, Rev., § 5914); and *Wisconsin* (1849, R. S., c. 66, § 1; 1878, R. S., 2277.) So in *Texas* every interest (1879, R. S., § 4858); and in *Virginia* (1785, 12 Stats. at Large 149, § 1; 1873, Code 909, § 2.) In *Maine* rights of entry may be devised, notwithstanding disseisin, and also contingent and expectant estates (1821, P. L. 137, § 1; 1871, R. S. 559, §§ 1, 3; 563, § 4.) In *Massachusetts* any interest, except estates tail, including a right of entry (1859, G. S., c. 92, §§ 1, 3.) In *New Hampshire* any interest, notwithstanding dispossession or disseisin (1878, G. L., c. 193, § 3.) In *Rhode Island* any interest in fee-simple, fee-tail, or for other term (1872, G. S., c. 171, § 1.)

(*i*) Vol. I., p. *52.

5. After-acquired real estate passes by devise by statute in *Alabama* (1852, Code, § 1592; 1876, Code, § 2277); *Arkansas* (1815, Comp. L. 556, § 1); *California* (1850, P. L. 179, § 22; 1872, Code, § 6312,) if such intention appear; and an intention to devise testator's whole estate is sufficient, (1866, P. L. 381); *Colorado* (1877, G. L., § 2788); *District of Columbia* (1857, Rev. Code, c. 52, § 3), if intention appear; *Connecticut* (1831, P. L.

FEES ON COPYHOLDS.

IV. (*k*) Provided always, and be it further enacted, That where any real estate of the nature of customary freehold, or tenant right or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will,

As to the fees and fines payable by devisees of customary and copyhold estates.

the grantor's death (1852, Rev. Code, § 694; 1874, R. S. 194,) and all devises to persons in ecclesiastical office were made void and changed to trusts for the corporation, vesting in it at the trustee's death. (Laws 1855, c. 275.)

ALIENS could not take real property by devise or conveyance in England prior to the statute of 33 Vict., c. 14, § 2, in 1870, (see vol. I., p. 185.) This principle, as one of the English common law, became the law of the British colonies in America. It had been changed in most of the United States by statute—long prior to the act of 33 Vict. An alien may now give or take by devise in *Alabama*, (Laws 1875, p. 120, § 1; Code 1876, § 2860); *California*, (Code 1850, § 671; ed. 1872, § 5671; amdts. 1874, p. 217); *Colorado*, (Laws 1861, p. 57; 1867, p. 45; 1877, p. 90); *Florida*, (Laws 1829, Duv. 363); *Georgia*, (Code 1873, § 1661, although before 1875 this was restricted to one hunndred and sixty acres, and conditioned on his taking oath to improve the lands, Code, § 2676, repealed 1875, P. L. 21); *Illinois*, (Laws 1829, p. 207, § 48; 1833, p. 626); *Iowa*, (1839, P. L. 486, § 49; Code 1873, § 1908); *Kansas*, (Const. 1859, Bill of Rights, § 17); *Kentucky*, (1873, P. L. 190, amending G. S. 1873, c. 14, §§ 4, 5, which restricted holding for residence or business purpose to twenty-one years, and under a devise to eight years); *Maine*, (1871, R. S. 559, c.

323; 1838, P. L. 245; 1854, Stats., p. 483, § 4; 1866, G. S. 401, § 4; 1875, G. S. 368, § 4); *Delaware* (1852, Rev. Code, 272, § 25; ed. 1874, p. 508); *Georgia* (1858, Code, § 2425; 1873, Code, § 2461;) *Illinois* (1829, Rev. Code 191, § 1; 1833, R. L. 611, § 1; 1845, R. S. 536, § 1; 1872, R. S., c. 148, § 1; 2 Gross Stats. 450); *Indiana* (1843, R. S. 485, § 3; 1852, R. S. 308, § 2, and 311, § 9; 1876, R. S. 571, § 2,) if such intention appear; *Iowa* (1843, P. L. 666, § 3; 1873, Code, § 2323,) if such intention appear; *Kansas* (1859, P. L., c. 131, § 2; 1862, Comp. L., c. 215,) if such intention appear, (1865, P. L., c. 86, § 54; 1868, G. S., c. 117, § 53; 1877, G. S., § 5734); *Kentucky* (1797, 1 Litt. 611, § 1; 1851, R. S., c. 106, § 2; 1873, G. S., c. 113, § 2); *Maine* (1871, R. S. 564, § 5,) if such intention appear; *Maryland*, if intention appear in wills executed before June, 1850, (1849, P. L., c. 229, § 2,) and unless contrary intention appear in wills executed after June, 1850, (Id., § 1; 1860, Code, art. 93, § 309; Rev. Code 1878, art. 49, § 13); *Massachusetts* (1836, R. S.; 1859, G. S., c. 92, § 4,) if such intention clearly appear; *Michigan* (1857, Comp. L., c. 92; 1871, Comp. L., § 4324,) if such intention is clear; *Minnesota* (1851, R. S., c. 53, § 3; 1866, G. S., c. 47, § 3; Id., ed. 1872, p. 646,) if such intention appear; *Mississippi* (1821, Hutch. Code, 649, 650, § 14; 1871, Rev. Code, § 2388); *Missouri* (1808, 1 T. L. 140, § 18; 1814, Id. 405, § 25; 1821, Id. 786, § 1; 1825, R. L. 790, § 1); *Nebraska* (1855, P. L. 63, § 42,) if such in-

(*k*) See 4 and 5 Vict., c. 35, §§ 88, 89, 90.

no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees and sums of money, as would have been lawfully

73, § 2; but see Id. p. 507); *Maryland*, (1874, Code, p. 354; 1878, Rev. Code 398; 1791, c. 45, § 6, applicable also to the *District of Columbia*); *Massachusetts*, (1852, P. L. 17; 1860, G. S. 473, c. 90, § 38); *Michigan*, (Rev. 1827, p. 272, 2 T. L., p. 333; 2 Comp. L. 1871, § 4305, p. 1366); *Minnesota*, (1866, G. S., c. 75, § 23; 1878, G. S. 820, c. 75, § 41); *Mississippi*, restricted to resident aliens, (Code 1871, § 2322); *Nebraska*, (1866, R. S. 292, c. 43, § 59; 1873, G. S., c. 61, § 54); *New Hampshire*, restricted to resident aliens, (R. S. 1842, p. 129, § 4; C. S. 1853, p. 135, § 5; G. S. 1867, p. 121, § 17; G. L. 1878, p. 325, c. 135, § 16); *New Jersey*, (1817, P. L. 4; 1874, Rev. 6, § 3); *North Carolina*, (Laws 1870, c. 255, § 1; Bat. Rev. 1873, c. 3, § 1); *Ohio*, (1804, 29 L. 463; 1880, Rev., § 4173); *Oregon*, (1872, Laws, § 1; 1874, G. L. 588, § 35); *Pennsylvania*, (Purd. Dig. 66; act of 1791, § 1, 3 Sm. 4); *Rhode Island*, (1872, G. S. 348, c. 161); *Virginia*, (1866, P. L. 643, § 1; 1872, P. L. 174; 1873, Code, 130, § 18); *West Virginia*, (Const. 1872, art. 2, § 5, as to resident aliens; 1872, P. L., c. 48, § 2; 1878, R. S., c. 3, § 2); *Wisconsin*, (1878, R. S. 631, § 2200); *District of Columbia*, (Code 1816, p. 87, § 103; Rev. Code 1857, c. 47, § 2; and see laws of Maryland, *supra*.) And after declaration as to naturalization papers, in *Arkansas*, (R. S. 1838, c. 7; 1847, c. 9, § 1; 1873, § 225); *Delaware*, (Code 1852, c. 81, § 1; ed. 1874, p. 493; and see Rev. Code, §§ 1581–6, and 3 Stats. 68, A. D. 1799, and Id. 386, A. D. 1805, validating devises prior to 1805); *Indiana*, (act of 1818, R. S. 1838, c. 3; restricted to "*bona fide* residents of the United States," 1 R. S. 1852, p. 232, c. 23, § 1); *Missouri*, may acquire "by descent or purchase," hold and alienate, (1825, R. S. 126; 1835, R. S. 66; 1845, R. S. 113, c. 6; 1855, R. S. 186, c. 5); *Tennessee*, (1871, C. S., §§ 1998, 1999; and see Laws 1853, c. 42, § 2); and naturalization papers taken out; *New York*, (1 R. S. 1830, p. 720; 2 Id., p. 57, § 4.) In *Connecticut*, until 1849, an alien could neither take nor hold real estate without special legislative license, (1 R. S. 1821, tit. 56, § 5, p. 301; R. S. 1838, p. 389.) In 1849 the right to purchase, hold or transmit

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tention appear (1856, P. L., p. 94, § 5; 1866, R. S. 82, § 125); *Nevada* (1862, Comp. L., p. 60, § 20,) if such intention appear; *New Hampshire* (1842, R. S., c. 156, § 2; 1878, G. L., c. 193, § 2,) if such intention appear; *New Jersey* (1851, P. L. 218, § 3; 1877, Rev. 1248, § 24,) "unless a contrary intention be manifest on the face of the will;" *New York* (1829, 3 R. S. 58, § 7); *North Carolina* (1873, Bat. Rev., c. 119, § 5; 1845, P. L. 125, § 1); *Ohio* (1808, 6 Laws 64, § 1; 1840, 38 L. 120, § 48, if such intention clearly appear; 1852, 50 L. 297, § 54; 1878, 75 L. 838, § 57; 1880, Rev., § 5968); *Pennsylvania*, (Purd. Dig., ed. 1872, p. 1474, § 11; 1833, P. L. 249, § 10,) unless a contrary intention appear; *Rhode Island*, (1857, R. S. 356, § 1; 1872, G. S. 374, § 1,) if such intention appear; *South Carolina* (1858, 12 Stats. at Large, 597, § 1; 1873, R. S. 446); *Tennessee* (1842, P. L. 193, § 4; 1852, P. L. 262, § 2; 1858, Code, § 2195; 1871, Comp. Stats., § 2195); *Texas* (Const., art. 5361, p. 913); *Vermont*, (1851, Comp. Stats. 327, § 2; 1870, G. S., c. 49, § 2,) if such intention appear; *Virginia* (1835, P. L. 43; 1873, Code, 909, § 2); *West Virginia* (1868, Code, c. 77, § 1); *Wisconsin*, (1849, R. S. 353, c. 66, § 3; 1878, R. S., § 2279,) if such intention appear. See also vol. I., p. 602, n. 4; and note to section XXIV. of this act.

due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering or enrolling such surrender, if the same real estate had been surrendered to the

real property was given to aliens resident in the United States, (R. S. 1849, p. 455; C. S. 1854, p. 630,) and this was afterward extended to citizens of France not resident in the United States, so long as like privileges were accorded by the French government, (G. S., 1875, p. 4.) In *South Carolina* the title of alien purchasers prior to 1807 was made valid by statute of that year, (5 Stats. at Large, 547, § 1,) and such holder was enabled to devise to an alien descendant, (§ 2), on condition of his becoming a resident within twelve months thereafter, (§ 3.) By law of *Texas*, aliens have the same rights which are bestowed by their government on citizens of the United States, (1854, P. D. 45; 1879, R. S., p. 5.)

INDIANS have been made the subject of special enactment in several states. It is believed that in the absence of such enactment, they are governed by the same law as resident aliens, Parent *v.* Walmsley, 20 Ind. 82. In Massachusetts, in 1747, (III. Prov. L. 383), it was provided that no devise by an Indian should be valid without the approbation of the General Court. So in Indiana (R. S. 1843, c. 28, § 3.) And in New York it was provided by the Revised Statutes of 1829–30, (1 R. S. 719), that an Indian could neither devise nor take by devise without legislative authority.

CONVICTS. One convicted of crime can make a will in *Georgia* (1858, Code, § 2376; 1873, § 2411); and in *Kentucky* (1802, 3 Litt. 71.) But a convict while in prison cannot make a will in *Rhode Island* (1872, G. S. 568.)

The statutes of nearly all the states provide that the testator shall be *of sound mind*, or of sane mind, or of sound mind and memory. Such statutes have been enacted in *Alabama* (1806, Toulm. Dig. 883, § 2; 1852, Code, §§ 1589, 1595; 1876, Code, §§ 2274, 2280); *Arkansas* (1815, Comp. T. L. 556, § 1; 1847, R. S., c. 170, § 1; 1873, R. S., § 5760); *California* (1850, Code, c. 72, § 1; ed. 1872, § 6270); *District of Columbia* (1816, Code 77, § 75); *Colorado* (1861, P. L. 398, § 1; 1867, R. S., c. 90, § 1; 1877, G. S., § 2788); *Connecticut* (1821, 1 R. S. 199, § 1; 1849, R. S. 345, § 1; 1866, G. S. 401, § 1); *Delaware* (1829, P. L. 221, § 2; 1852, Rev. Code 272, § 2); *Florida* (1822, P. L. 52, § 1; 1828, P. L. 141, § 51); *Georgia* (1858, Code, §§ 2372, 2374; 1873, §§ 2407, 2409. This latter section defines the requisite intellectual capacity to be "that which is necessary to enable the party to have a decided and rational desire as to the disposition of his property"); *Illinois* (1829, Rev. Code 191, § 1; 1845, R. S. 536, § 1; 1872, R. S., c. 148); *Indiana* (2 R. S., 1852, p. 308, § 1; 2 R. S., 1876, p. 570, § 1); *Iowa* (1839, P. L. 472, § 3; 1843, P. L. 666, §§ 1, 4; Code, ed. 1873, § 2322); *Kansas* (1855, T. L., c. 164, §§ 1, 2; 1865, P. L. 169, § 1; 1868, G. S., ed. 1878, § 6113); *Kentucky* (1785, 1 Litt. 611, § 1; 1851, R. S., c. 106, § 2; 1873, G. S., c. 113, § 2); *Maine* (1821, P. L. 137, § 1; 1871, R. S. 563, § 1); *Maryland* (1798, c. 10, § 3; Code 1860, art. 93, § 100; Rev. Code 1878, Art. 49, § 3, "of sound and disposing mind, and capable of executing a valid deed or contract"); *Massachusetts* (1671, New Plim. Col., p. 281; 1784, 1 L. 109, § 1; G. S. 1859, c. 92, § 1); *Michigan* (1809, 2 T. L. 13, § 1; 1857, 2 Comp. L., c. 92, § 1; 1871, 2 Comp. L., § 4322); *Minnesota* (1851, R. S., c. 53, § 1; 1866, G. S., c. 47, § 1); *Mississippi* (1871, Rev. Code, § 2388; 1821, Hutch. Code 647, § 14); *Missouri* (1807, 1 T. L. 131, § 18; 1825, R. S. 790, § 1; 1845, R. S. 1078,

use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid, shall be paid in addition to the stamp duties, fees, fine or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

COPYHOLD.

Wills, or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

V. And be it further enacted, That when any real estate of the nature of customary freehold, or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition

§ 1; 1865, G. S., c. 131, § 1; 1879, R. S., § 3960); *Nebraska* (1855, P. L. 63, § 41; 1866, R. S., c. 14, § 123; 1873, G. S., c. 17, § 123); *New Hampshire* (1822, P. L. 10, § 1; 1853, C. S. 165; 1867, G. S. 174; 1878, G. L., c. 193, §§ 1, 6); *New Jersey* (1795, Pat. Rev. 189, § 3; 1874, Rev. 1244, § 3); *New York* (1787, 1 Greenl. 386, § 5; 1829, 2 R. S. 56, § 21); *Ohio* (1824, 22 L. 119, § 3; 1840, 38 L. 120, § 1; 1852, 50 L. 297, § 1; 1878, 75 L. 838, § 2; 1880, Rev., § 5914); *Oregon* (1850, G. S. 724, § 1; 1855, P. L. 384, § 1); *Pennsylvania* (1833, P. L. 249, § 1; Purd. Dig. 1474, § 1); *Rhode Island* (1872, G. S., c. 171, § 1); *South Carolina* (1733, 2 Stats. at Large 341, § 1; 1789, 5 Id. 106, § 2; 1873, R. S. 442, § 1); *Texas* (1840, P. L. 167, § 1; 1879, R. S. 4857); *Vermont* (1821, C. L. 334, § 16; 1851, C. S. 327, § 1; 1862, G. S., c. 49, § 1); *Virginia* (1873, Code 910, § 3); *West Virginia* (1868, P. L. 92, § 3); *Wisconsin* (1849, R. S., c. 66, § 1; 1878, R. S., § 2277); this rule in substance and of clear necessity forms part of the law of every state, whether expressed in statutory formula or not.

of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such *trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties and services shall be paid and rendered by the devisee as would have been due from the customary heir, in case of the descent of the same real estate; and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties and services, as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of descent.

and the lord to be entitled to the same fine, &c., when such estates were not previously devisable as he would have been from the heir in case of descent.

ESTATES PUR AUTRE VIE.

VI. (*l*) And be it further enacted, That if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *per autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate. [6]

Estates *pur autre vie.*

(*l*) Vol. I., p. *62.

6. Estates *pur autre vie* pass in *Alabama* as chattels real (1852, Code, § 1594; 1876, Code, § 2279); in *Minnesota* as real property (1876, P. L., c. 37, § 1.) Estates *pur autre vie*, not disposed of by will, go as assets to the executor or administrator in the *District of Columbia* (1816, Code, p. 78, § 78); so in *Indiana* (1831, R. S. 272, § 18; 1838, R. S. 315, § 18); *New Jersey* (1795, Pat. Rev. 189, § 1; 1874, Rev. 1243, § 1); *New York* (1787, 1 Greenl. 386, § 4; 1829, 2 R. S., 6th ed., 56, § 2); *South Carolina* (1873, R. S. 442, § 3); *Texas* (1840, P. L. 167, § 1); and *Virginia* (1785, 12 Stats. at Large 152, § 51; 1792, 18 Id. 97, § 54.) See also note 3, *supra*.

AGE OF TESTATOR.

No will of a person under age valid;

VII. (*m*) And be it further enacted, That no will made by any person under the age of twenty-one years shall be valid.[7]

(*m*) Vol. I., p. *44.

7. INFANTS. In regard to testamentary age, there is a distinction made between real and personal property. As to the latter, the ecclesiastical courts of England followed the rule of the civil law. "A boy after the age of 14 years and a wench after the age of 12 years may make a testament and dispose of their goods and chattels, and that not only without the authority or consent of their curator or guardian, but also without the authority and consent of the father, if he or she have any goods of his or her own," Swinb., pt. II., § 2. See also 2 Blackst. Com. 497. By the statute of 34 and 35 Hen. VIII., c. 5, § 14, devises of real property by an infant under the age of twenty-one years were declared to be invalid. The common law, as above stated, remained unchanged at the time of the settlement of the American colonies. It was not changed in England, except as to appointment of testamentary guardian, until the act of 1 Vict. In *Alabama*, it was enacted in 1806, that an infant under the age of twenty-one years should have no power to devise real property, and this remains the law of Alabama, as it is that of most of the United States (Toulm. Dig. 883, § 2; 1852, Code, § 1589; 1876, Code, § 2274.) The code of 1852 (§ 1595; 1876, Code § 2280,) gave an infant of eighteen years power to bequeath personal property. By act of 1873 (P. L. 94, § 1; Code 1876, § 2735,) provision is made for relieving an infant of the disabilities of non-age by order of the court on petition. In *Arkansas* the law is the same, except as to relief from disability (1815, Comp. T. L. 556, §§ 1, 2; 1847, R. S., c. 170, §§ 1, 2; 1873, R. S., §§ 5760, 5761.) By the Revised Statutes of 1873 (§ 3034), it is provided that a female shall be of age for all purposes at eighteen years. In *California* (Code 1850, c. 72, § 1; Code 1872, § 6270,) every person of the age of eighteen years can make a will if of sound mind. In *Colorado* males of the age of twenty-one years, and unmarried females of the age of eighteen years, may devise real property (1861, P. L. 398, § 1; 1867, Rev. Stat. c. 90, § 1; G. S. 1877, § 2788,) and all persons of the age of seventeen years may bequeath personal property (G. S., 1877, § 2788.) For power of married women, see note to section VIII. In the *District of Columbia* no will of real estate could be made by an infant under the age of twenty-one years (Code 1816, 77, § 75; Rev. Code 1857, c. 52, § 1.) In *Connecticut* the Revised Code of 1784 (§ 3) fixed the testamentary age at twenty-one for real property and seventeen for personal property (1821, R. S., tit. 32, p. 199, § 1; C. S., 1838, tit. 31, c. 1, § 1; 1849, R. S. 345, § 1; 1854, Stats. 483, § 1; 1866, G. S. 401, § 1.) This was changed in 1870 (P. L. 422; 1875, G. S. 368, § 1,) to eighteen years for all kinds of property. In *Delaware* it was fixed at twenty-one without distinction between real and personal property (1829, P. L. 221, § 2; 1852, Rev. Code 272, § 2.) So in *Florida* (1822, P. L. 52, § 1; 1828, P. L. 141, § 51.) In *Georgia* the common law remains unchanged as to testamentary age, except that no infant under fourteen years can make a valid will (1858, Code, § 2371; 1873, Code, § 2406.) In *Illinois* the age is fixed as to real property, at twenty-one years for males and eighteen years for females (unmarried females until 1861),

and as to personal property, at seventeen years for both males and females, until 1872, when that provision was omitted in the revision (1829, Rev. Code 191, § 1; 1833, P. L. 611; 1845, R. S. 536, § 1; 1872, R. S., c. 148, § 1.) In *Indiana* infants are excepted from the authority to make wills conferred by the statutes of wills (2 R. S., 1852, p. 308, § 1; 1859, P. L. 245; 2 R. S. 1876, p. 570, § 1.) So in *Iowa* (1839, P. L. 472, § 3; 1843, P. L. 666, §§ 1, 4; 1880, Rev. Code, § 2322.) Minority, however, ends with females at the age of eighteen and with all persons on their marriage (1880, Rev. Code, § 2237.) In *Kansas* the age is fixed at twenty-one years for real property, and eighteen years for personal property (1855, T. L., c. 164, §§ 1, 2; 1859, P. L., c. 63, § 1; 1865, c. 86, § 1; 1868, G. S., c. 117, § 1; ed. 1878, § 6113.) So in *Kentucky* until 1851 (1 Litt. 611, § 1; 2 Litt. 121, 1798,) but now no will, except in execution of a power or for appointment of testamentary guardian, can be made under the age of twenty-one years (1851, R. S., c. 106, § 3; 1852, R. S. 693; 1873, G. S., c. 113, § 3.) In *Maine* at twenty-one for real property (act of 1821, p. 137, § 1; 1871, R. S. 563, § 1.) In *Maryland*, for real property, at twenty-one for males and at eighteen for females (Laws 1798, c. 10, § 3, applicable also to the *District of Columbia;* 1860, Code, art. 93, § 300; 1878, Rev. Code, art. 49, § 3.) In *Massachusetts* the act of 1641 enabled all persons of the age of twenty-one to devise their real estate. The act of 1671 (Laws New Plym. Col., p. 281,) gave a general testamentary power to persons "of competent age." The act of 1641 was restored in this respect in 1784 (1 Laws 109, § 1.) The right to dispose of either real or personal property by will is now given by statute only to persons of full age (1859, G. S., c. 92, §§ 1, 2.) This is now the rule in *Michigan* also (1857, Comp. L., c. 92, § 1; 1871, Comp. L., c. 154, § 4332.) Formerly the law gave females of eighteen power to devise real estate (1808, 2 T. L. 13, § 1,) and infants of fourteen power to bequeath personalty (1811, 1 T. L. 160, § 2.) In *Minnesota* the law is the same as in Michigan (1851, R. S., c. 53, § 1; 1866, G. S., c. 47, § 1.) So in *Mississippi* (1871, Rev. Code, § 2388,) although formerly unmarried females of eighteen might make a will (1821, Code 647, § 14.) In *Missouri* the power is given generally to all persons of twenty-one years to devise real property, and all persons of eighteen years to bequeath personalty (1807, 1 T. L. 131, §§ 18, 19; 1814, 1 T. L. 405, §§ 25, 26; 1821, 1 T. L. 786, §§ 1, 2; 1825, R. L. 790; 1835, R. S. 617; 1845, R. S. 1078; 1855, R. S., c. 167, §§ 1, 2; 1865, G. S., c. 131, §§ 1, 2; 1879, R. S., c. 71, § 3960.) In *Nebraska* the power is given generally to every person of full age, (Laws 1855, p. 63, § 41; 1856, c. 37, § 1; 1860, c. 5, §§ 1, 4; 1866, R. S., c. 14, §§ 123, 126; 1873, G. S., c. 17, §§ 123, 126.) In *Nevada* every person of the age of eighteen may make a will of both personal and real estate, (1862, Comp. L., c. 61, § 1; ed. 1873, vol. I., p. 199.) In *New Hampshire* every person of the age of twenty-one might dispose by will of his or her real estate, (1822, P. L. 10, § 1,) and may now dispose of real and personal property, (1853, C. S. 165; 1867, G. S. 174; 1878, G. L., c. 193, §§ 1, 6,)—including married women, as to which see *supra*. In *New Jersey* no person under the age of twenty-one can make a will of either real or personal property, (Laws 1850, p. 280, § 1; 1851, p. 218, § 5; 1874, Rev. 1244, § 3; 1248, § 26.) Prior to 1850 the common law rule obtained as to testamentary age for wills of personal property, (act of 1795, Pat. Rev. 189, § 12; 1874, Rev. 1245, § 9.) In *New York*, by act of 1789, (1 Greenl. 386, § 5,) infants were declared incapable of devising real property, but the Revised Statutes of 1829–30 (2 R. S. 46, § 21,) gave the power of disposing of personalty by will to

males at eighteen and *unmarried* females at sixteen. The distinction between married and unmarried females is now removed, (1867, P. L. 1927.) In *North Carolina* the common law rule was changed in 1811 (P. L., c. 17,) so as to prohibit wills of personal property under the age of eighteen, (1821, R. S., c. 820.) The present law, however, allows no will to be made under the age of twenty-one, (Bat. Rev. 1873, c. 119, § 2.) In *Ohio*, until 1824, males of the age of twenty-one, and females of the age of eighteen, were competent to make a will, (1808, 6 L. 64, § 1; 1810, 8 L. 146; 1816, 14 L. 141.) By acts of 1824 (22 L. 119, § 3,) and 1831, (29 L. 242, § 3,) no infant could make a will, and by later acts, only persons of full age can do so, (1840, 38 L. 120, § 1; 1852, 50 L. 297, § 1; 1878, 75 L. 838, § 2; 1880, Rev., § 5914.) In *Oregon* the testamentary age is retained at twenty-one for wills of real property, and at eighteen for wills of personalty, (1850, G. S. 274, §§ 1, 2.) In *Pennsylvania* the testamentary age is fixed at twenty-one for all wills (1833, P. L. 249, § 3; Purd. Dig. 1872, p. 1474, § 3.) In *Rhode Island* the age is fixed at twenty-one for real property and eighteen for personalty (1857, R. S. 356, §§ 1, 6; 1872, G. S. 374, §§ 1, 6.) In *South Carolina* infants under the age of twenty-one have been and continue to be excepted from the wills act (act of 1789, 5 Stats. at Large 106, § 2; 1873, R. S. 442, § 1.) In *Tennessee* the statute of North Carolina (1811, P. L., c. 17,) prohibiting wills of personalty by an infant under eighteen years is in force, so far changing the common law. In *Texas* only persons of the age of twenty-one could make a will (1840, P. L. 167, § 1,) until this was extended to all persons "who may be or may have been lawfully married" (1879, R. S., § 4857.) In *Vermont* the act of 1821 (C. L. 334, § 16,) made infants incapable of making a will of real property. This was changed in 1851 (C. S. 327, § 1; 1862, G. S., c. 49, § 1,) to eighteen for females, and by the same statutes (§ 4) every one might dispose of personal property by will. These acts seem to restore the common law rule as to personalty. In *Virginia* since 1785 the age has been twenty-one years for real property and eighteen for personalty (12 Stats. at Large 140, §§ 1, 4; 1792, 13 Id. 88; 1835, P. L. 43; 1873, Code, 910, § 3.) So in *West Virginia* (1868, P. L. 92, § 3; 1868, Code, c. 77, § 2); and *Wisconsin* since 1878 (R. S., § 2281,) although formerly only persons of full age could make a will there (1849, R. S., c. 66, § 1.) A married woman may, however, dispose of her separate property at the age of eighteen (1870, P. L. 10; 1878, R. S., § 2277.) In the year 1660 an exception to infants' testamentary disability was made in favor of the appointment of testamentary guardians by fathers, themselves still under age, for their infant children.

TESTAMENTARY GUARDIAN. By the statute of 12 Charles II., c. 24, § 8, enacted in the year 1660, a father might appoint a guardian by will for his infant child, although himself under the age of twenty-one years. "It is clear by the common law a man could not by any testamentary disposition affect either his land or the guardianship of his children. The latter appears never to have been made the subject of testamentary disposition till the statute of 12 Charles II. It is impossible to contend that it was comprehended under the statute of 32 Hen. VIII," Lord Alvanley, C. J., in Ex parte Earl of Ilchester, 7 Ves. 370, (1803.) As this statute formed no part of the common law at the time of settlement of the American colonies, the right depends for its existence among us on American statutes. The English statute of 12 Charles II. was, however, contained in Chancellor Kilty's list of British statutes in force in *Maryland* in 1809 (Alexander's Brit. Stats., p. 466,) but it thas been held there not to apply to nuncupative wills, Dorsey *v.* Sheppard, 12 Gill & J. 192. In *New Hampshire* it seems

MARRIED WOMEN.

VIII. Provided also, and be it further enacted, That no will made by any married woman shall be valid, ex- nor of a *feme covert*, except

to have been "inferred" to be in force in Noyes *v.* Barber, 4 N. H. 406; Balch *v.* Smith, 12 N. H. 437. It was never in force in *Massachusetts*, 2 Dana Abr. 11; Wardwell *v.* Wardwell, 9 Allen 518, 520.

The statutory provision of 12 Car. II., c. 24, § 8, has been enacted in many of the United States, viz: *Alabama* (1822, Toulm. Dig. 386, § 1); *Arkansas* (1847, R. S., c. 70, § 5; extended to the "lawful surviving parent" by R. S. 1873, § 3040); *California* (Code 1872, § 5241; in the case of an illegitimate child, the mother, Id.); *Colorado* (1861, P. L. 348, § 17, or the mother, if a widow and unmarried); *Connecticut* by act of 1840 (Rev. 1875, p. 192, § 11, applying to all parents except married women); *Delaware* (Rev. Code 1874, p. 576, § 8); *District of Columbia* (1816, Code 1, § 2); *Illinois* (1835, P. L. 35, or the mother, if a widow. As to the extent of the powers given by this statute see Holmes *v.* Field, 12 Ill. 427); *Iowa* (1860, Rev., § 2544; Code, § 88, or the mother, if a widow); *Kansas* (1862, C. L., c. 106, § 2, the natural guardian, whether father or mother, may appoint; 1865, P. L., c. 86, § 72; 1868, G. S., § 2711); *Kentucky* (1873, G. S., c. 48, § 2; and see c. 113, § 3); *Maryland* (1834, P. L., c. 73, extended to the mother if capable of making a will, c. 291, § 3; Code 1860, art. 93, § 148; Rev. Code 1878, art. 52, § 11); *Massachusetts* (R. S. 1832, c. 79, § 6; G. S. 1859, c. 109, § 5; and if the father has failed to do so, the mother may, Laws 1877, p. 491; but this power extends only to the relation of parent and child, Brigham *v.* Wheeler, 8 Metc. 127, and can be executed only in the manner provided for the execution of wills in G. S. 1859, c. 92, Wardwell *v.* Wardwell, 9 Allen 518); *Michigan* (1857, Comp. L., c. 110, § 10; 1871, Comp. L. § 4819, but such appointment is not to take effect if the infant's mother survives, without the approval of the court, 1877, P. L. 3); *Minnesota* (1851, R. S., c. 67, § 10; 1866, G. S., c. 59, § 6, including after-born children); *Mississippi* (1871, Rev. Code, § 1203); *Missouri* (1835, R. S. 296, § 14; 1845, R. S., c. 73, § 32; 1855, R. S., c. 72, § 40; 1865, G. S., c. 116, § 5; 1879, R. S., § 2564); *Nebraska* (1866, R. S., c. 23, § 11; 1873, G. S., c. 26, § 11); *Nevada* (1861, T. L. 257, § 11); *New Jersey* (1795, Pat. Rev. 189, §§ 10, 11; 1874, Rev. 464, § 1, to which appointment, however, the consent of the infant's surviving mother is now necessary 1871, P. L. 23; 1874, Rev. 465, § 1. As to execution of such will see 1877, Rev. 1247, § 22); *New York* (1787, 1 Greenl. 386, § 11; 1829, 3 R. S., 6th ed., 167, and if the father be dead the mother, although a minor, may, by the revised statutes, appoint a testamentary guardian; *North Carolina* (1873, Bat. Rev., c. 53, § 1); *Ohio* (1831, 29 L. 242, § 24; 1840, 38 L. 120, § 66; 1852, 50 L. 297, § 72; or if the father be dead, such appointment may be made by the surviving mother 1880, Rev., § 6266); *Oregon* (1853, Comp. L. 323, § 10); *Pennsylvania* (1833, P. L. 249, § 4. This act applies only to "any person *competent*" to make a will, and being a father. By act of 1855 (P. L. 431, § 6,) this right is forfeited by neglect for a year to provide for the child's support); *Rhode Island* (1857, R. S., c. 154, § 1, restricted, however, to persons "authorized by law" to make a will except married women); *South Carolina* (1748, 3 Stats. at Large 708; 1873, R. S., 485); *Tennessee* (1762, c. 5, § 2, applicable also to *North Carolina;*

such as might have been previously made.

cept such a will as might have been made (*n*) by a married woman before the passing of this act. (*o*) [8]

1873, Bat. Rev., § 2492); *Texas* (1879, R. S., § 2497; 1876, P. L. 175, giving the power to the surviving parent); *Vermont* (1862, G. S., c. 72, § 8); *Virginia* (1873, Code, c. 123, § 1); *West Virginia* (1868, Code, c. 100, § 1, extended to a mother who is a widow or unmarried); *Wisconsin* (1878, R. S., § 3965.)

(*n*) Vol. I., pp. *38, *41, *687.

(*o*) Vol. I., p. *337.

8. MARRIED WOMEN had no power at common law to dispose of their property by will, nor is this power given to them by statute in England. To this rule certain exceptions were made at an early day, *e. g.*, in favor of the wife of an exile, Countess of Portland *v.* Prodgers, 2 Vern. 104; or of a felon convict transported for life, In re Martin, 2 Roberts 405; or in case of desertion by husband under the divorce act of 1857, 21 and 22 Vict., c. 108, §§ 21, 24; or by consent of her husband to a particular will of personal property, Wms. Ex'rs (6th Am. ed.) 78, but not of real property, Id. 76, n.; or under antenuptial agreement, or in execution of a power of appointment, or in regard to lands held for her separate use (see vol. I., p. 82.) More especially a devise to her husband was void at common law, Fitch *v.* Brainard, 2 Day 163. "The equity of which prohibition (if I may be so bold with the good favor of our temporal lawyers to insert the reason and consideration of the civil law) is not obscure. For if this gap were left open few children should succeed in the mother's inheritance. But by how much the husband were more cruel, and the wife more timorous, he crafty, she credulous, by so much the more were the lawful heir in danger to be disherited and the cruel and deceitful husband in hope to be unworthily enriched and advanced." Swinb., pt. II., § 9. In *Alabama* the wills act of 1806 (Toulm. Dig. 883, § 2,) gives the power of devise to "every person" with no exception of married women, and this section is copied in the code (1852, § 1589; 1867 and 1876, § 2274,) but by § 1989 of the code of 1852 (1876, § 2713,) it is provided that a married woman may make a will of her separate estate. In *Arkansas* in the territorial law of 1815 (Comp. T. L. 556, § 1,) married women are expressly excluded unless they act under a marriage settlement or a special authority executed by the husband in writing. By the Revised Statutes of 1847, (c. 170, § 3) this special authority must have been executed prior to the marriage. By the Revised Statutes of 1873 (§ 5762) she may devise her separate property as a *feme sole*. In *California* the code of 1850 (c. 72, § 2) requires for the validity of such devise, either the annexed written consent of the husband duly attested, or that it be made under a marriage settlement or by virtue of an antenuptial written authority of the husband. These requirements are dispensed with by act of 1866 (P. L. 317; Code 1872, ed. 1876, § 6273.) In *Colorado* a married woman may make a will subject to the restriction that she cannot give more than half of her property away from her husband without his consent, (1861, P. L. 153, § 4; 1867, R. S., c. 60, § 4; 1877, G. S. 614, § 1750.) In the *District of Columbia* she was excepted in the statute of wills, (Code 1816, 77, § 75; Rev. Code 1857, c. 52, § 1); but can devise her separate property or execute a power of appointment, (R. C., § 8.) In *Connecticut* a married woman may make a will without restriction, by act of 1809, (P. L. 15, since then frequently reenacted, 1875, G. S., p. 368, § 1.) In *Delaware* married women were excepted as late as the act of 1829 (P. L. 221, § 2,) and the code of 1852, (R. C., 272, § 2,) but enabled by act of 1873, c. 550, with the consent of her husband, and subject

to his right of curtesy. In *Florida* married women were excepted in the act of 1822, (P. L. 52, § 1,) but this exception is omitted in the subsequent acts of 1823 (P. L. 101, § 1,) and 1828, (P. L. 141, § 51.) The act of 1822 (§ 7) contains a proviso saving the wife's right to her separate estate. In *Georgia*, by the code of 1858, (§ 2375; 1873, § 2410,) a married woman may make a will under a power in the instrument creating the estate, or under a power of appointment, or regarding her separate estate, or in case of abandonment by her husband, or divorce, and in no other case. In *Illinois*, prior to 1861, a married woman might dispose by will only of her separate real and personal estate, (1829, R. C. 191, § 1; 1833, P. L. 611; 1845, R. S. 536, § 1,) but in 1861 (P. L. 143) an act was passed making all property of a married woman separate estate, to be enjoyed as if she were sole. See, too, 1872, R. S., c. 148, § 1. In *Indiana* a married woman may now make a will as if sole, (1847, P. L. 108; 1859, P. L. 245; 1876, R. S. 570, § 1.) In *Iowa* the statute of wills extends to "every person," without exception of married women, (1839, P. L. 471, § 1; 1843, P. L. 666, §§ 1–4; 1873, Code 411, § 2322.) In *Kansas* there is no exception of married women in the statute (1855, T. L., c. 164, § 1; 1859, P. L., c. 63, § 1,) enabling every person of proper age and sound mind to make a will, but it is provided in the General Statutes of 1868 (c. 117, § 35,) that a married man or woman cannot bequeath away from wife or husband more than half of his or her estate without a written consent duly executed and attested. In *Kentucky* married women are excepted in all the earlier statutes of wills, (1785 and 1797, 1 Litt. 611, § 1; 1851, R. S. 227, c. 106, § 2; 1852, R. S. 693,) but by act now in force (1873, G. S., c. 113, § 4,) a married woman may make a will to dispose of her separate estate or in execution of a power. The statutes of *Maine* authorize every one of proper age and sane mind, to dispose of property by will, (1821, P. L. 137, § 1; 1871, R. S. 563, § 1.) In *Maryland*, the earlier statutes of wills enable only such persons to make a will as are "capable of executing a valid deed or contract" (1798, c. 10, § 3; Code 1860, art. 93, § 300; Rev. Code 1878, art. 49, p. 419, § 3,) but by act of 1842 (P. L., c. 393, § 6; Code 1860, *supra*, § 308; Rev. Code 1878, *supra*, § 12,) a married woman may make a will to her husband or other person, executed sixty days before her death, on a private examination first had by witnesses out of her husband's presence, whether she was induced by fear, threats or ill usage. This requirement by the code and revised code does not apply to separate property acquired after the code of 1860 went into effect. In *Massachusetts* the earliest acts of 1641 and 1671 (Laws of New Plymouth Colony, p. 281,) apply to all persons of competent age and sound mind, married women being neither excepted nor enabled by express words. So, too, the act of 1784 (1 Laws 109, § 1,) and the Revised Statutes of 1836. By the act of 1842 (P. L. 527) she was authorized to dispose by will of her separate property by consent of her husband, not, however, in such manner as to affect his rights. The act of 1850 (P. L. 403) further enabled her to devise or bequeath property to her husband. By the act of 1855 (P. L. 710) her right to devise her real estate was made subject to the husband's right of curtesy, and her power to bequeath her personal property away from her husband was limited to one-half. So Laws 1857, p. 599; 1859, G. S. 538, c. 108. In *Michigan* a married woman's power to dispose of her property by will was extended by act of 1848, to a policy of insurance on the life of her husband for her sole use (1 Comp. L. 1871, p. 1479,) but the husband's consent, executed in the presence of witnesses, and annexed to the wife's will, was, until 1873, necessary to its validity (1857, Comp. L., c. 92, § 1; 1 Comp. L. 1871, c. 154, § 4322.)

This requirement seems to have been done away by the act of 1873 (P. L. 13), giving power to all persons of full age and sound mind to dispose of their property by will. The same requirement formed part of the laws of *Minnesota* (1851, R. S. 53, § 1; 1866, G. S., c. 47, § 1,) until struck out by act of 1869 (P. L. 75), and a married woman of full age may, without her husband, execute a power of appointment by will (1878, R. S. 558, § 38.) In *Mississippi* by the code of 1821 (ed. 1848, p. 647, § 14,) and the revised code of 1871 (§ 2388), every person of proper age and sound mind (with no exception of married women) may make a will; and a married woman may dispose of her property by will as if unmarried (Rev. Code, § 1785.) In *Missouri* married women were at first excepted from the wills act unless authorized by marriage settlement or special written authority of husband (1 T. L. 1807, p. 140, § 18; 1 T. L. 1814, p. 405, § 25; 1 T. L. 1821, p. 786, § 1; 1825, R. L. 790, § 1; 1835, R. S. 617, §§ 1, 3; 1845, R. S. 1078, §§ 1, 3; 1855, R. S., c. 167, §§ 1, 3.) The exception was first omitted in 1865, (G. S., c. 131, § 1,) and in 1877 (P. L. 262) an act was passed authorizing married women to dispose of their real and personal property by will, subject only to the right of curtesy, and this is now the law in Missouri (1879, R. S., c. 71, § 3961.) The statutes of *Nebraska*, on the other hand, have since 1860 required the husband's written consent to his wife's will to be duly attested and annexed thereto (1860, P. L., c. 5, § 1; 1866, R. S., c. 14, § 123; 1873, R. S., c. 17, § 123.) With the same proviso in *Nevada* a married woman might dispose by will of her separate property and her interest in common property (1862, Comp. L., c. 61, § 2.) This proviso was struck out in 1873 (P. L. 102.) In *New Hampshire*, prior to 1845 the statute of wills gave power to every person of proper age and sound mind, with no express exception of married women (1822, P. L., p. 10, § 1; 1853, C. S. 165; 1867, G. S. 174; 1878, G. L., §§ 1, 6.) Married women were first expressly authorized by act of 1845 (P. L. 236) to dispose of real property by will, subject, however, to all rights of their husbands, and by act of 1854 (P. L. 1418) such devise could not be to the husband. This was changed in 1860, (P. L. 2248), and in 1858 the wife of an insane person was enabled to dispose of her separate property by will, presumably clear of her husband's rights (1858, P. L. 1980.) In *New Jersey* married women were first authorized by statute to make a will in 1864, (P. L. 698), subject, however, to the husband's rights. This proviso practically subjected the will to the husband's consent. It was changed in 1874 so as to save only the husband's right of curtesy in her real property (Rev. 1874, p. 638, § 9.) The statute of 1795 (Pat. Rev. 189, § 3,) included coverture among testamentary disabilities in wills of real estate and estates *pur autre vie*, and by inadvertence this provision still remains upon the statute-book (Rev. 1874, p. 1244, § 3.) In *New York* by the act of 1787 (1 Greenl. 386, § 5,) a married woman was declared incapable of making a will. This incapacity was not removed until 1867, (P. L., 1927,) although enabled to transfer her separate personal property by act of 1860 (P. L. 157, § 2.) She could before that execute a power of appointment without the concurrence of her husband (1827, 1 R. S. 732, § 80; 735, § 110; 6th ed., vol. II., p. 1114, § 101; p. 1116, § 131.) In *North Carolina* the power of a married woman to make a will is still limited to the execution of a power of appointment or a power of disposal contained in the instrument creating the estate (1845, P. L. 125, § 8; 1873, Batt. Rev., c. 119, § 3.) In *Ohio* every person without exception as to coverture, is authorized to make a will (1808, 6 L. 64, § 1; 1810, 8 L. 146, § 1; 1816, 14 L. 141, § 1; 1824, 22 L. 119, § 1; 1840, 38 L. 120, § 1; 1852, 50 L. 297, § 1; 1878, 75 L. 838, § 2; 1880, Rev., §

EXECUTION OF WILLS.

IX. (*p*) And be it further enacted, That no will shall be valid unless it shall be in writing[9] and executed in manner hereinafter mentioned; (that is to say,) it shall be signed (*q*) Will to be in writing, and

5914.) In *Oregon* married women can only make wills by virtue of their marriage settlement or a written authority of the husband executed before marriage (1850, G. S. 274, § 3,) and her devise of real property is subject to his right of curtesy (1855, Comp. L. 784, § 3.) In *Pennsylvania* married women were authorized by the act of 1833 (P. L. 249, § 1; Purd. Dig. 1872, p. 1474,) to devise real property under a power of appointment, and to bequeath personal property by consent of husband. This power was afterwards made general as to property of every kind (1848, P. L. 537; Purd. Dig. 1872, p. 1474, § 2,) subject, however, to the husband's curtesy, except where made in the exercise of a power of appointment over a trust for her separate use (1855, P. L. 430; Dig., *supra*, § 21.) In *Rhode Island*, a married woman may make a will subject to her husband's curtesy (1856, P. L. 1269; 1857, R. S. 356, § 3; 1872, G. S. 374, §§ 1, 6.) In *South Carolina* married women were excepted from the statutes of wills of 1733 (2 Stats. at Large 341, § 5,) and 1789 (5 Stats. at Large, 106, § 2.) This exception was done away as to wills in execution of a power in 1866 (13 Stats., p. 438,) and altogether in 1873 (R. S. 442, §§ 1, 17.) In *Tennessee* she may make a will of her separate estate (1852, P. L. 260, § 4; 1858, Code, § 2168,) or in execution of a special power (Id.) In *Texas* the statute gives power to make a will to every person, irrespective of coverture (1840, P. L. 167, § 1,) and this is extended by the Revised Statutes of 1879 (§ 4857) to all persons, irrespective of age, "who may be or may have been lawfully married." It is believed that this and that of Iowa are the only statutes in the United States with this provision. In *Vermont* no exception of married women is made in the earlier statutes (1797, Dig. L. 119, § 1; 1821, Comp. L. 334, § 16; 1851, Comp. Stats. 327, §§ 1, 4; 1862, G. S., c. 49, §§ 1, 4,) but they were not expressly authorized to make a will until 1847 (P. L. 26; 1851, Comp. Stats. 403; 1862, G. S., c. 71, § 17.) They were excepted in the *Virginia* statutes of 1785 (12 Stats. at Large 140, c. 61, § 1,) and 1792 (13 Id. 88, § 1,) and still remain so (1835, P. L. 43; 1873, Code 909, §§ 2, 3,) except as to separate estate and execution of powers (Code, *supra*, § 3.) In *West Virginia* there is no such exception in the wills act (1868, Code, c. 77, § 1.) In *Wisconsin* in 1849 (R. S. 324, § 38,) a married woman was authorized to make a will in execution of a power, but in general only by annexed written consent of husband duly attested (1849, R. S. 353, c. 66, § 1.) This power was made general and independent of consent as to her separate property in 1870 (P. L. 10), and as to all property in 1878 (R. S., § 2277.)

(*p*) Vol. I., p. *105.

9. Before the statute of 32 Hen. VIII., no wills were required to be in writing. That act, and the act of 34 and 35 Hen. VIII., required all devises of land to be in writing, but left wills of personal property as before. By the Roman law wills had assumed the form of a conveyance purely formal, and a *nuncupatio* or publication. "In this latter passage of the proceeding the testator either orally declared to the assistants the wishes which were to be executed after his death, or produced a written document in which

(*q*). Vol. I., pp. *77, *105, *110.

his wishes were embodied." Maine's Anc. Law 212. It was this *nuncupatio* that gave its name later to verbal or nuncupative wills, by which the testator orally disposed of his goods and chattels. Such will might be proved by any competent evidence, and was recognized by the common law under which the American colonies were settled. Soon after such wills were "practically abolished" in England by the statute of frauds, 29 Car. II., c. 3, (see vol. I., p. 238,) which although not itself in force in the United States, has become the law very generally by similar enactments. This act (§ 19) prohibited all verbal testamentary gifts of personal property exceeding in value £30, unless proved by three witnesses present at the time, and unless the testator had, at the time, called on some of the persons present to bear witness that such was his will, and unless such will was made during the testator's last sickness, and at his residence or where he had resided for at least ten days next before the making of such will, except where surprised away from home by sickness and death before his return. It also provided (§ 20) that after six months from its publication, no testimony should be received to prove it, unless substantially committed to writing within six days after the making of the will; and further (§ 21), that no letters testamentary should issue on such will within fourteen days after testator's death, nor should such will be admitted to probate until the widow or next of kin had been cited and had opportunity to appear and contest it. It was also provided (§ 22) that no written will of personal property should be repealed or altered by a verbal will, unless the latter be committed to writing in testator's lifetime, read to and allowed by him, and proved to have been done so by three witnesses at least. For the provision as to nuncupative wills of soldiers and mariners, see section XI., and note 13, *infra*. In *Alabama* and other territory under the northwestern ordinance of 1787, the first provision for wills required them to be in writing. The act of 1806 (Toulm. Dig. 883), required this only as to devises of real property (§ 2), and contained for bequests of personalty exceeding $100 in value, the provisions of § 19 as to calling on witnesses and proof by them, and for all nuncupative wills of personalty the provisions of § 19 as to time and place (Id., § 3.) Subsequently by the code (1852, § 1611; 1876, § 2294,) all wills were required to be in writing, except bequests of personal property not exceeding $500 in value (Code 1852, § 1615; 1876, § 2298,) and the provisions of § 19 were applied to all nuncupative wills (Id. 1852, § 1616; 1876, § 2299.) The provisions of § 20 were also enacted (1806, Toulm. Dig. 883, § 5; Code 1852, § 1619; Code 1876, § 2302); and § 21 (1506, Id., § 4; Code 1852, § 1619; 1876, § 2301.) In *Arkansas* by the territorial law of 1815 (Comp. L. 556, § 5,) the provisions of §§ 19 and 20 are made applicable to nuncupative wills; likewise § 21 (Id., § 6.) But it is only required that persons present be called on by testator to witness where the value of the property bequeathed exceeds $200, and in such case the fact must be proved by two witnesses. The provisions of § 19 with the above changes are extended to all nuncupative wills by the Revised Statutes of 1838 (1847, R. S., c. 170, § 24; 1873, R. S., § 5775,) and all nuncupative wills are prohibited which bequeath property in excess of $500. It is also provided that there shall be no probate of a nuncupative will after the lapse of six months, unless reduced to writing within fifteen days after making and signed by the witnesses (1847, R. S., c. 170, § 26; 1873, R. S., § 5777); nor shall such will be proved within twenty days after testator's death, nor without citation as in § 21 of the statute of frauds (1847, R. S., c. 170, § 27;

1873, R. S., § 5778.) All other wills must be in writing (1815, Id., § 1; 1847, Id., § 4; 1873, Id., § 5763.) In *California* all wills must be in writing except nuncupative wills (1850, P. L., c. 72, § 3; Code 1872, § 6276.) The provisions of § 19 of the statute of frauds are contained in the act of 1850, (Id., § 7,) to be proved by two witnesses present, but the provision as to place was afterwards struck out by amendment of 1874 (Code, § 1289.) Moreover, no nuncupative will could be made for property exceeding $500 in value (§ 7, *supra*.) This was changed to $1000 by the code of 1872, (ed. 1876, § 6289,) by which it was further provided that "the decedent must at the time have been in actual military service in the field or doing duty on shipboard at sea, and in either case in actual contemplation, fear or peril of death; or the decedent must have been at the time in expectation of immediate death from an injury received the same day." Section 20 of the statute of frauds remains, the time for reducing to writing being enlarged to thirty days (1850, *supra*, § 8; Code, *supra*, § 6290); likewise § 20, reduction to writing being made, however, a condition to probate (1850, *supra*, § 9; Code, *supra*, § 6291.) In *Colorado* all wills must be in writing except nuncupative wills (1861, P. L., p. 398, § 2; 1867, R. S., c. 90, § 2; 1877, G. L., § 2789.) A nuncupative will of personal property is valid if reduced to writing within a "reasonable time" (R. S., *supra*, § 3; G. L., *supra*, § 2790; formerly thirty days, 1861, P. L., p. 401, § 10,) and proved by two credible witnesses. The witnesses must also prove that they were present at the pronouncing of the will, and believe that the testator was of sound mind and memory, and that the testator called upon some person present to bear witness, and that the will was made during his last sickness and reduced to writing within ten days (1861, P. L. 40, § 10; R. S., § 3; G. L., § 2807.) No letters testamentary on such will can issue for sixty days after testator's death, (Id., Id., Id.,) and there could be no probate without citation of widow or next of kin (1861, P. L. 402, § 11.) In the *District of Columbia* devises of real property were required to be in writing by the code of 1816 (p. 77, § 75,) and now no nuncupative will is allowed, except wills of soldiers and sailors not exceeding $200 in amount (1857, Rev. Code 214, c. 52, § 10.) In *Connecticut* real property can only be devised by written will (1784, Rev. Code 115; 1821, Rev. 199, § 2,) and this requirement was extended in 1848 to wills of personal property (P. L. 36; 1849, R. S. 345; 1854, Stats. 483, § 2; 1866, G. S. 401, § 2; 1875, G. S. 368, § 2.) In *Delaware* all devises of land must be in writing (1753, 1 St. L. 342; 1809, 4 Id. 270; 1829, P. L. 221, § 2; 1852, Rev. Code 272, § 3; 1874, Id. 508, § 3.) Nuncupative wills of personal property were at first valid, if reduced to writing and subscribed by two witnesses within two days after testator's death, and proved within six months, by acts of 1700 and 1706. By act of 1753 nuncupative wills of personal property exceeding £50 in value were invalid, unless proved by two witnesses who were present at the publication, and unless made during testator's last sickness, and at his home or place where he had resided at least ten days, except in case of surprise or sudden death before returning home (1753, 1 St. L. 342, § 4; 1809, 4 St. L. 270, § 4.) And such will must be proved within six months, and must have been reduced to writing within six days after being pronounced (Id., Id., § 5,) and no probate or letters could be granted on such will within fourteen days after testator's death (Id., Id., § 6.) These provisions were changed in 1829 to the present law, which makes nuncupative wills valid only to the amount of $200, and requires that they be published in the presence of two witnesses, and reduced to writing within three days, and postpones their

probate for thirty days after testator's death (1829, P. L. 221, § 3; 1852, Rev. Code 272, § 5; 1874, Id. 508, § 5.) In *Florida* devises of real property are required to be in writing (1822, P. L. 52, § 1; 1823, P. L. 101, § 1; 1828, P. L. 141, § 5,) and nuncupative wills were only valid, if pronounced during testator's last sickness in the presence of two or more witnesses (since 1828, three,) called upon by testator to bear witness (1822, P. L. 52, § 5; 1823, P. L. 101, § 3; 1828, P. L. 142, § 53.) Originally such will must have been reduced to writing within six days, and proved within six months (1822, P. L., § 5; 1823, P. L. 101, § 4); now changed to a prohibition of probate after six months, unless reduced to writing and sworn to by the witnesses within six days after being pronounced (1828, P. L. 142, § 54.) No probate can be granted on such will until sixty days after testator's death, and upon citation of widow and next of kin (1823, P. L. 101, § 5; 1828, P. L. 142, § 55.) Such will may be revoked by parol, if the revocation be reduced to writing, read to and approved by the testator, and the facts proved by three witnesses (1823, P. L. 101, § 6; 1828, P. L. 142, § 56.) In *Georgia* the English statute of 29 Charles II., c. 3, is printed in full in Schley's edition of English statutes in force in that state (p. 252.) By act of 1852 (P. L. 104; 1858, Code, § 2379; 1873, Code, § 2414,) all wills must be in writing, except nuncupative wills. All property may pass by nuncupative will (1858, Code, § 2446; 1873, Code, § 2482.) Nuncupative wills must be proved by three witnesses present at the publication of the will, and called on by the testator to bear witness to it, and can only be executed during testator's last sickness, and at his house or his residence for at least ten days before his death, unless he was surprised by sudden sickness and death away from home, and such will must be reduced to writing within thirty days after being pronounced, and proved within six months after testator's death (1858, Code, §§ 2443, 2444; 1873, Code, §§ 2479, 2480.) In *Illinois* written wills were provided for by the northwestern ordinance of 1789 and by the act of 1819, (P. L. 231, § 22,) and the revised code of 1829 (p. 192, § 2,) requires all wills to be in writing, (1833, P. L. 611; 1845, R. S. 536, § 2; 1872, R. S., c. 148, § 2.) Nuncupative wills of personal property are, however, made valid if reduced to writing within ten (since 1829, twenty,) days, and proved by two credible disinterested witnesses, who must swear that they heard the testator pronounce such will and call upon some person or persons present to bear witness to it, and that they believed the testator to be of sound mind; and such will must have been made in testator's last sickness, and cannot be proved until sixty days after his death, (1819, P. L. 231, § 24; 1829, Rev. Code 194, § 8; 1833, P. L. 614; 1845, R. S. 538, § 9; 1872, R. S., c. 148, § 15.) In *Indiana* all wills of real property must be in writing, (1807, P. L. 84, § 32; 1818, P. L. 149, § 37; 1824, R. L., c. 45, § 5; 1831, P. L. 272, § 13; 1838, Rev. 314, § 13; 1852, R. S. 313, § 18; ed. 1876, p. 575.) Nuncupative wills were excepted, but these were not valid if they disposed of property exceeding $80 in value, (changed by act of 1829 to $50, and in 1852 to $100,) unless proved by two witnesses who were present, and unless testator called on some person or persons present to bear witness to the will; and such will must have been made during testator's last sickness, and (until 1852) at his home or place of abode for ten days at least prior to his death, unless surprised away from home by sudden sickness and death, (1807, P. L. 85, § 34; 1818, P. L. 151, § 39; 1829, P. L. 46, § 35; 1831, P. L. 273, § 17; 1838, Rev. 315, § 17; 1852, R. S. 314, § 20; ed. 1876, p. 576.) By the acts of 1807 (§ 35) and 1818, (§ 40), no probate could be granted on such will after six months from testator's death,

unless it had been reduced to writing within six days after it was pronounced; but in 1829 it was enacted that no probate could be granted after six months, and such will must have been reduced to writing within six days in all cases—changed in 1831 to fifteen days—(1829, P. L. 46, § 35; 1852, R. S. 314, § 20; 1876, Id. 576.) Nor could probate be granted of such will except on citation of widow or next of kin, and (until 1829) at least fourteen days after testator's death, (1807, P. L. 86, § 36; 1818, P. L. 152, § 41; 1829, P. L. 46, § 35; 1852, R. S. 314, § 20; ed. 1876, p. 576.) In *Iowa* all wills must be in writing (1839, T. L. 471, § 2,) except nuncupative wills of personal property, (limited in 1843 to $300), and such will must be proved by two competent witnesses, (1839, T. L. 474, § 9; 1843, P. L. 667, § 6; 1873, Code, § 2324.) Prior to 1843 it was further required that such will be reduced to writing within twenty days, and be proved by two credible witnesses, who must swear that they were present and heard the testator declare the same and call upon some person or persons present to bear witness to it, and that they believe that testator was of sound mind and memory, and that the said will was made in testator's last sickness, or on a voyage at sea, or a field of battle, "or under such other circumstances that it could not be reduced to writing by the testator," and no letters testamentary were to be issued on such will until sixty days after testator's death, (1839, T. L., 474, § 9.) In *Kansas* every will must be in writing, (1855, T. L. 754, § 3; 1865, P. L., c. 86, § 2,) except nuncupative wills of personal property made in testator's last sickness, and reduced to writing within ten days, and subscribed by two competent witnesses; and it must be proved that the testator was of sound mind and memory, and not under restraint, and called upon some person or persons present to bear witness to his will, (1865, P. L. 185, § 74; 1868, G. S., c. 117, § 69; ed. 1873, § 6181,) and such will must be offered for probate within six months after testator's death, (Id., § 75; 1868, G. S., § 70; ed. 1878, § 6182.) Before 1865 nuncupative wills were limited to $300 worth of personal property, and before 1859 to $200 worth of property, and such will must have been made during testator's last sickness, and at his home or residence of at least ten days previous to his death, except in case of surprise by sickness and death away from home (1855, T. L., c. 164, § 21; 1859, P. L., c. 131, § 3; 1862, Comp. L., p. 903, c. 215.) The act of 1859 (§ 3) required such will to be proved in one year, and the act of 1855 (§ 23) required that it be reduced to writing within thirty days after it was pronounced and proved within six months after testator's death, but not within fourteen days and after citation of widow or next of kin (§ 24.) In *Kentucky* nuncupative wills were provided for by act of 1785 (1 Litt. Stat. 611, §§ 5, 6,) as by act of 29 Car. II., c. 3, to be made during testator's last sickness and at his home or residence of at least ten days prior to his death, unless surprised away from home by sickness and death, and if the property bequeathed exceeded £10 in value it must be proved by two witnesses that testator called on some person present to bear witness, and probate of such will must be made within six months after testator's death, unless it had been reduced to writing within six days after it was pronounced, nor (§ 16) within fourteen days, or without citation of widow or next of kin. By the revised statutes of 1851, however, power to make a verbal will is given only to soldiers and sailors (p. 227, c. 106, § 7; 1873, G. S. 831, c. 113.) In *Louisiana* verbal testaments are abrogated, and nuncupative, or open wills, like mystic or sealed wills, must be in writing (1825, Comp. Code, §§ 1568, 1569; ed. 1870, §§ 1575, 1576.) In *Maine* all wills must be in writing except nuncupative wills (1821, P. L. 137, § 2; 1871,

R. S. 563, § 1.) Nuncupative wills, if the property bequeathed exceeds $100 in value must be published in the presence of three witnesses during testator's last sickness and at his home or place of abode for at least ten days previous to his death, except in case of surprise by sickness and death away from home (1821, P. L. 137, § 5; 1871, R. S. 563, §§ 18, 20.) No probate of such will can be made more than six months after testator's death, unless it has been reduced to writing within six days after its publication (1821, *supra*, § 7; 1871, *supra*, § 19,) nor until fourteen days after testator's death and on citation (1821, § 6; 1871, § 16, p. 508.) In *Maryland* the statute of 29 Car. II., c. 3, is included in Chancellor Kilty's list of English statutes "introduced, used or practiced by the courts of law or equity in this state." Sections 19 and 20 of this statute were afterwards made part of the Maryland statute law, with change in limitation of amount from £30 to $300 (1810, P. L., c. 34, §§ 1, 2; 1860, Code, art. 93, §§ 306, 307; 1878, Rev. Code, art. 49, §§ 10, 11; and see vol. I., p. 239, n.) All devises of real property must be in writing (1860, Code, art. 93, § 301; 1798, P. L., c. 101, § 4.) In *Massachusetts* the act of 29 Car. II., c. 3, was substantially enacted in 1692 (Acts, &c., Mass. Bay, vol. I., p. 47,) and by the same act (p. 46) devises of real estate were required to be in writing. An earlier act of 1671 (Laws New Plym. Col. 281), required but two witnesses to a nuncupative will, but provided that it should be reduced to writing within three days, and proved at the next term of court. The act of 1784 (1 Laws 109, §§ 3, 5,) substantially re-enacts this law, fixing the limit to unwitnessed parol wills at £50. By the general statutes of 1859, however, (c. 92, § 9,) no provision is made for other nuncupative wills than those of soldiers and sailors. In *Michigan* devises of real property must be in writing, (1809, 2 T. L. 13, § 1; 1838, R. S. 271, § 5; 1839, P. L. 220, § 5; 1871, Comp. L., § 4326.) Nuncupative wills of personal property exceeding $100 in value were provided for and restricted in the same manner as by the statute of frauds, (1809, 2 T. L. 13, §§ 3-5.) In 1811 (1 T. L. 160, § 2,) the number of necessary witnesses was reduced to two, and such wills were required to be written down and attested within six days after testator's death. By the existing law, no nuncupative will is valid for property exceeding in value $300, (1871, Comp. L., § 4327, c. 154, § 6.) In *Minnesota* all except nuncupative wills must be in writing, (1851, R. S., c. 53, § 5,) and nuncupative wills are now permitted only to soldiers and sailors in actual service, (1866, G. S., c. 47, §§ 5, 6.) Formerly nuncupative wills were allowed in the same manner and with the same restrictions, where the property bequeathed exceeded $150 in value, as by the statute of 29 Car. II., c. 3, (1851, R. S., c. 53, §§ 6, 7.) In *Mississippi* devises of real property are required to be in writing, (1821, Hutch. Code 647, § 14,) and the provisions and restrictions of the statute of frauds, except as to attestation, apply to all nuncupative wills, (Hutch. Code 1821, p. 647, §§ 18-20; 1871, Rev. Code, §§ 2392-2394,) and if the property bequeathed exceeds in value $100, it must be proved by two witnesses that the testator called on some person or persons present to bear witness to the will. In *Missouri* the provisions of the statute of frauds, except as to attestation, were applied to all nuncupative wills, and if such will disposed of property exceeding in value $200, it must be proved by two witnesses that the testator called on some person or persons present to bear witness to it, (1808, 1 T. L. 142, §§ 23-25; 1814, Id. 406, §§ 29, 30; 1821, Id. 786, §§ 5, 7—changing time to reduce to writing from six to thirty days; so, 1825, R. L. 790, §§ 5, 7; but § 4 of this act prohibited all nuncupative wills for more than $200

worth of property, and applied the provisions of § 23 of the act of 1808 to all nuncupative wills; so, 1835, R. S. 617, §§ 6, 8, 11; 1845, R. S. 1078, §§ 23, 25, 26; 1855, R. S. 1567, c. 167, §§ 22, 24, 25; 1865, G. S, c. 131, §§ 21, 23, 24; 1879, R. S., §§ 3984, 3986, 3987.) In *Nebraska* personal property to the amount of $200 might be bequeathed by a verbal will made in the presence of two competent witnesses, by the act of 1855, (P. L. 63, § 43,) and all other wills were required to be in writing, (§ 45.) In 1866, however, the provisions of the statute of frauds were enacted to apply to nuncupative wills exceeding $150 in amount, (1860, P. L., c. 5, §§ 6, 7; 1866, R. S., c. 14, §§ 128, 129; 1873, G. S., c. 17, §§ 128, 129.) In *Nevada* all but nuncupative wills must be in writing, (1862, P. L., c. 61, § 3,) and no nuncupative will is valid for more than $1000 worth of property; and all nuncupative wills must be made during testator's last sickness, and proved by two witnesses present at the time, and the testator must have called upon the persons present, or some of them, to bear witness to his will, (§ 5.) No proof of such will can be made more than three months after it was spoken, (§ 6), nor can it be admitted to probate within fourteen days after testator's death, or without citation of widow or next of kin, nor unless first reduced to writing by the probate judge (§ 7.) In *New Hampshire* the statute of frauds, as relating to nuncupative wills of personal property to the value of $100 was enacted in 1822, (P. L. 10, § 4,) and §§ 19 and 20 were re-enacted in 1878 (G. L. 454, c. 193, § 16.) In *New Jersey* the provisions of the statute of 29 Car. II., c. 3, are applied to nuncupative wills of property not exceeding $80 in value (1795, Pat. Rev. 189, §§ 14–16, 18; 1877, Rev. 1245, §§ 11–13, 15.) All other wills must be in writing (1850, P. L. 280, §§ 1, 3; 1851, P. L. 218, §§ 1, 6; 1877, Rev. 1247, § 22; 1248, § 27.) In *New York* statutory provision was first made for written wills in 1649 by an ordinance of the directors and council of New Netherland (N. Y. Col. MSS. IV., p. 437.) This ordinance provides that "whereas, it is daily observed that * * * grave mistakes are committed in the writing and drawing up of evidences by private persons who are neither qualified thereto by oath nor called thereto by authority, whereby frequently many things are written to the advantage of those who have the papers drawn up, interspersed with sinister, obscure and dubious words," therefore all "contracts, testaments," &c., "which shall not be written by the secretary or other authorized person" shall be invalid. And it was further enacted in 1656 (N. Y. Col. MSS. XVIII., p. 24,) that "all skippers, commissaries, supercargoes, assistants, secretaries, notaries, auditors and others, who as public persons write wills, shall particularly take care that they are acquainted with the testators, and be careful that they duly comprehend the testator's intention, and that on and in their respective ships and places of residence all the people's wills be correctly written and registered in a book, and signed by the testator and two credible witnesses besides the skipper," special provision being made for soldiers marching against the enemy. By the statute of wills of 1787 (1 Greenl. 386, §§ 15–17,) the provisions of the act of 29 Car. II., c. 3, as to nuncupative wills, were enacted, but by the Revised Statutes of 1829 (2 R. S. 58, § 22,) no nuncupative wills are allowed except those of soldiers and sailors in actual service. In *North Carolina* the act of 1784 (c. 22, §§ 15, 16,) applied the provisions of the statute of frauds to all nuncupative wills of property above the value of £100. This was changed by the act of 1841, (P. L. 103), which required wills of personalty to be executed with the same formalities as wills of realty, and all wills in North Carolina must now be executed in writing (Batt. Rev. 1873, c. 119, § 1.) In *Ohio* nuncupative wills are only allowed

for personal property, can only be made during testator's last sickness, and must be proved by two disinterested witnesses, and it must be proved by them that testator was at the time of sound mind and memory and not under restraint, and that he called on some person present to bear witness to his will, (1808, 6 L. 64, § 5; 1816, 14 L. 141, § 5; 1824, 22 L. 119, § 9; 1831, 29 L. 242, § 11,) and must since 1840 be reduced to writing and subscribed by the witnesses within ten days (1840, 38 L. 120, § 68; 1852, 50 L. 297, § 74; 1880, Rev., § 5991.) Formerly no probate of such will could be made after six months unless it had been reduced to writing within six days, (1808, 6 L. 64, § 6; 1810, 8 L. 146, § 6); but since 1816 there can be no probate after six months, and until 1824 the will must have been reduced to writing in six, now ten, days (1816, 14 L. 141, § 6; 1824, 22 L. 119, § 10; 1831, 29 L. 242, § 12; 1840, 38 L. 120, §§ 68, 69; 1852, 50 L. 297, §§ 74, 75; 1880, Rev., §§ 5991, 5992.) In *Oregon* all wills must be in writing, except nuncupative wills to an amount not exceeding $200, and such will must have been made under the circumstances required by the statute of frauds, and proved by two witnesses, and cannot be proved after six months, unless reduced to writing within thirty days, nor can it be proved within fourteen days after testator's death, nor without citation of widow or next of kin (1850, G. S. 274, §§ 4, 23, 25, 26; 1855, P. L. 384.) In *Pennsylvania* all wills must be in writing (1833, P. L. 249, §§ 6, 17; 1872, Purd. Dig. 1474, §§ 6, 17,) except nuncupative wills of personal property, which may be made under the circumstances set out in the English statute, without limitation as to amount bequeathed; but if the amount exceeds $100, the will must be declared by the testator in the presence of two witnesses to be his will (1833, P. L. 249, § 7; 1872, Purd. Dig. 1474, § 8.) There is no special provision as to the probate of such wills. In *Rhode Island* wills of personal, as of real, property must be in writing (1857, R. S. 356, §§ 4, 7.) In *South Carolina* the provisions of the statute of 29 Car. II., c. 3, became law in 1712 by formal enactment (2 Stats. at Large 435.) To this was added in 1733 the requirement that such wills should be proved by competent witnesses (3 Stats. at Large 341, § 3; 1873, R. S. 447, § 26.) Since 1789 nuncupative wills for property of not more than £10, now $50, value may be made and proved as prescribed by the English statute, except that there can be no probate after twelve months, and it is not postponed for fourteen days after testator's death (1789, 5 Stats. at Large 106, §§ 4, 5; 1873, R. S. 447, §§ 24, 25, 27.) In *Tennessee* the provisions of the English statute apply, the limitation of amount therein being fixed at £100 in 1784 and changed to $250 in 1852 (1784, L, c. 22, §§ 15, 16; 1858, Code, §§ 2165, 2166; 1871, Comp. S., Id.) In *Texas* the provisions of the statute of frauds were copied into the statute of 1840, with a change of £30 to $30, and by omission of all amount this was afterward (1876, P. L., c. 84, § 4,) made applicable to all nuncupative wills (1840, P. L. 167, §§ 6, 7, 11; 1879, R. S., §§ 4862, 4865.) So in *Vermont* by act of 1797 (Dig. Laws 119, §§ 2-4,) changing £30 to $200; but the provisions as to probate have been dropped from the later statutes (1821, Comp. L. 334, § 19; 1851, Comp. S. 327, § 8; 1862, G. S., c. 49, § 8.) So in *Virginia*, by act of 1748 (5 Stats. at Large 456, §§ 9-11,) changing the number of witnesses to two, and the amount from £30 to £10. This act continued in force (1785, 12 Stats. 141, §§ 5, 6; 1792, 1 Stats. at Large, N. S., 88, §§ 5, 6, changing amount to $30,) until 1840 (P. L. 50); when wills of personalty, except nuncupative wills, were required to be executed like wills of real property, and by the code of 1873 (p. 910, §§ 4-6,) no exception is made except in favor of soldiers and sailors. The law of *West Virginia* is in this respect like that of Virginia (1868,

at the foot or end (*r*) thereof by the testator, or some other person in his presence and by his direction; (*s*) [10] and such signature shall be made *or acknowledged (*t*) by the testator in the presence of two or more witnesses, present at

signed or acknowledged in the presence of two witnesses at one time, who attest.

Code, c. 77, §§ 3, 5.) In *Wisconsin* nuncupative wills for an amount exceeding $150 must be executed and proved according to the provisions of the statute of frauds (1838, T. L. 182, §§ 23, 24; 1849, R. S. 354, §§ 6, 7; 1878, R. S., §§ 2292, 2293.) All devises of real property must be in writing (1838, *supra*, § 21; 1849, *supra*, § 5; 1873, *supra*, § 2282.)

(*r*) Vol. I., pp. *105, *107.

(*s*) Vol. 1., pp *77, *86, *110.

10. At common law the testator's signature was not necessary to the validity of a will of real or personal property, nor was it required by the statute of 34 Hen. VIII, c. 5. It first became the law of England in 1677 by the statute of 29 Car. II., c. 3, § 5. It must, however, appear that an unsigned will is complete, Salmon *v.* Hays, 4 Hagg. 382. Until the statute of 1 Vict., c. 26, effect was given in England to an unsigned will if it appeared that the will was complete and the execution only prevented by testator's sudden failing or death (vol. I., pp. 246, 247.) And this has been held in Virginia under the present statute in Mason *v.* Dunman, 1 Munf. 456, (1810), and as late as 1844, in Phœbe *v.* Boggess, 1 Gratt. 129, in which case the testator had died in the very act of signing.

It has been generally held that a *mark* is a sufficient signature (vol. I., p. 201.) The contrary was, however, held in Pennsylvania in 1846, and thereupon signature by mark was expressly provided for by the act of 1848, Asay *v.* Hoover, 5 Penna. St. 21; Grabill *v.* Barr, Id. 441. This is not expressly enacted in any other of the United States. In Kentucky the statute (see *infra*) seems to require that the testator's *name* be signed.

A *seal* was said to be alone a sufficient signature in Lemayne *v.* Stanley, 3 Lev. 1, (1670.) In this case, however, the will was written by the testator, beginning with the words "I, John Stanley," &c., and was sealed at the end, but not subscribed by the testator. This case was followed as late as 1727, in Warneford *v.* Warneford, 2 Stra. 764, but is now overruled by Smith *v.* Evans, 1 Wils. 313, (1751), and has never been followed in the United States. A seal was once held to be necessary to the proper execution of a will, Dormer *v.* Thurland, 2 P. Wms. 511, (1728); especially if required by the instrument creating a power which it is intended to execute, Rose *v.* Ewer, 3 Atk. 168, (1744); MacAdam *v.* Logan, 3 Bro. Ch. 310, (1791.) But in general a seal is now held to be unnecessary, Hight *v.* Wilson, 1 Dall 94, (1784); Avery *v.* Pixley, 4 Mass. 460, (1808); Piatt *v.* McCullough, 1 McLean 69, (Ohio, 1829.) It is not required by statute in Virginia, and "by long custom of Virginia," a scroll is sufficient in such case, Pollock *v.* Glassell, 2 Gratt. 453, (1846.) It is, however, required by statute in Nevada and New Hampshire. In Louisiana it is necessary in case of "mystic" wills. Of the seven seals affixed by the witnesses on the outside of the will made under Roman law, Sir H. Maine says: "This is the first appearance of sealing in the history of jurisprudence considered as a mode of authentication. It is to be observed that the seals of Roman wills and other documents of importance did not simply serve as the index of the presence or assent of the signatary, but were literally fastenings, which had to be broken before the writing could be inspected." Anc. Law, c. 6, p. 210. In

(*t*) Vol. I., p. *108.

Alabama sealing is expressly dispensed with. Sealing was formerly required in Massachusetts, Ohio and Vermont. As to statutes of the several states, see *infra*.

Even a *wrong name* may make a sufficient signature, In re Redding, 2 Rob. 339, (1850); being held to be equivalent to a mark. And where the signature is made for the testator by another, even the name of the other person has been held sufficient, In re Clark, 2 Curt. 329, (1839.) But in the latter case the person acting for the testator is required to sign the testator's name by statute in Arkansas, California, Kansas, Kentucky and West Virginia (see *infra*.)

It is, however, not necessary that *each sheet* of a will written on several sheets should be signed. This was declared to be "settled" as early as 1765, in Bond *v.* Seawell, 3 Burr. 1775, and such signature may be on a paper or parchment pasted or annexed in some other manner to the will, In re Gansden, 2 Sw. & Tr. 362, (1861); Cooke *v.* Lambert, 32 L. J, Prob. 93, (1863); In re Horsford, 3 L. R., P. & D. 211, (1874.) See further as to this note, *infra*.

The provision of 1 Vict., c. 26, § 9, for signature *by another person* is copied from 29 Car. II., c. 3, § 5. Similar provision is made by statute in Alabama, Arkansas, California, Colorado, District of Columbia, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia and Wisconsin, and formerly in New York, (see *infra*.) In some states the statute requires the person signing by testator's direction for him to sign the will himself as a witness also (as in California), and state that he had signed at the testator's request for him—Arkansas, Kansas and Oregon. This was also the law in Missouri from 1845 to 1853. In Pennsylvania the testator's signature is required "unless prevented by extremity of last sickness," (see *infra*.) But even since the act of 1848 in Pennsylvania, where the will is signed for the testator, his *mark* is not sufficient ratification of the act in the absence of other proof of signer's authority, Greenough *v.* Greenough, 11 Penna. St. 489 (1849.)

Until 1838 a will was held in England to be sufficiently signed if the testator's name was written by him at the beginning or in any other part of the will. The position of the signature by 1 Vict., c. 26, § 9, must be at the foot or end of the will, and this is defined and enlarged by 15 and 16 Vict., c. 24, § 1, to be "at or after, or following, or under, or beside, or opposite to the end of the will." For recent decisions under this act, see In re Hammond, 3 Sw. & Tr. 90, (1863); In re Williams, 1 L. R., P. & D. 4, (1865); Sweetland *v.* Sweetland, 4 Sw. & Tr. 9, (1865); In re Arthur, 2 L. R., P. & D. 273, (1871); In re Ainsworth, Id. 151, (1870.) Signature at the end of the will is required by statute (*infra*) in Arkansas, Kansas, Nebraska, New York, Ohio and Pennsylvania. Other statutes require the will to be "subscribed" by or for the testator: California, Connecticut and Kentucky

The American statutes as to the testator's signature are given below: In *Alabama* the northwestern ordinance of 1787, applicable in that territory until other laws should be adopted, provided that wills should be signed and sealed by the testator. In 1806 (Toulm. Dig. 883, § 2,) sealing was dispensed with, but the testator was required to sign the will, or it must be signed for him, in his presence and by his direction, by some other person. The same provisions were re-enacted in the code, (1852, § 1611; 1876, § 2294.) In *Arkansas*, by the territorial act of 1815, (Comp. L. 556, § 1,) wills were required to be signed by or for the testator in like manner. The Revised Statute of 1838

(1847, R. S., c. 170, § 4,) required that the will be subscribed by the testator at the end of the will, or for him in like manner, and (§ 5) that every person signing for the testator should write his name as a witness, and state that he had signed the testator's name at his request. To the same effect, see Revised Statutes of 1873, (§§ 5763. 5764.) In *California* wills must be signed by the testator, or by some other person subscribing his name for him, in his presence and by his direction, (1850, P. L. 177, c. 72, § 3; 1872, Code, § 6276,) and such person must sign the will as a witness, (Code, § 6278.) In *Colorado* wills must be signed by the testator, or by some other person for him, in his presence and by his direction, (1861, P. L. 398, § 2; 1867, R. S., c. 90, § 2; 1877, G. L. § 2789.) In the *District of Columbia* the same provision was made by the code (1816, p. 77, § 75,) adopted from the Virginia statutes. This provision remains unchanged in the revised code of 1857, (p. 213, c. 52, § 5,) but does not apply to holograph wills, and the testator's signature, if not made, may be acknowledged by him in the witnesses' presence. In *Connecticut* the act of 1784 (R. C. 115, § 3,) required the will to be signed. The revision of 1821 (p. 199, § 2,) required the will to be *subscribed* by the testator. See 1838, Comp. Stats, tit. 31, c. 1, § 2; 1849, R. S. 345, § 2; 1854, Stats. 483, § 2; 1866, G. S. 401, § 2; 1875, G. S. 368, § 2. In *Delaware* the provision as to signing by or for the testator is the same as in the statute of Victoria, (1852, Rev. Code 272, § 3; ed. 1874, p. 508,) except the requirement "at the foot or end thereof." In *Florida* wills which are not holograph or nuncupative must be signed as in Delaware, (1822, P. L. 52, § 1; 1823, P. L. 101, § 1; 1828, P. L. 141, § 51.) In *Georgia*, by act of 1852, (P. L. 104,) wills are required to be signed by the testator or by some other person for him, in his presence and by his direction. To same effect see the code (1858, § 2379; 1873, § 2414.) In *Illinois* the northwestern ordinance, above referred to, was at first applicable. Subsequently the act of 1819 (P. L. 231, § 22,) required all written wills to be signed by the testator. In 1829 the revised code added to this a provision for signing by some other person for the testator, in his presence and by his direction (1829, R. C. 192, § 2; 1833, P. L. 611; 1845, R. S. 536, § 2; 1872, c. 148, § 2.) In *Indiana* wills must be signed by the testator (1829, P. L. 46, § 33; 1824, c. 45, § 5; 1852, R. S. 313, § 18.) This last statute also provided for the signature by another for the testator, in his presence and by his direction. In *Iowa* all wills must be signed by the testator or by another for him, in his presence and by his direction (1839, T. L. 471, § 2; 1843, P. L. 667, § 5; 1873, Code, § 2326.) In *Kansas* every will must be signed, since 1865, at the end thereof by the testator or by another person for him, in his presence and by his direction (1865, P. L., c. 86, § 2; 1868, G. S., c. 117, § 2; ed. 1878, § 6114.) The earlier statutes provided for signature by the testator or for him, but made no reference to the position of the signature (1855, T. L., c. 164, § 3; 1859, P. L., c. 131, § 5; 1872, Comp. L., c. 215.) By the act of 1855 (§ 4) another person signing for the testator must also sign as witness, and state that he subscribed the testator's name for him at his request. In *Kentucky* the will must be signed by the testator or by some other person for him, in his presence and by his direction, "with the name of the testator subscribed" (1851, R. S., c. 106, § 5; 1873, G. S., c. 113, § 5.) This is copied from the act of 1797 (1 Litt. 611, § 1,) except the words quoted above. In *Louisiana* nuncupative wills, by public act before a notary, must be signed by the testator, or his excuse for not doing so stated in the will (Code 1825, § 1572; ed. 1870, § 1579.) Mystic or sealed wills must be signed by the testator (1825, Code, § 1577; ed. 1870, § 1584.) In *Maine* wills must be signed by the testator or by

another for him, in his presence and by his direction (1821, P. L. 137, § 2; 1871, R. S. 563, § 1.) In *Maryland* wills must be signed by the testator or by another for him, in his presence and by his direction (1698, P. L., c. 101, sub. c. 1, § 4; 1860, Code, art. 93, § 301; 1878, Rev. Code 420, § 4.) In *Massachusetts* it was provided by the act of 1671 (Laws New Plym. Col. 281), that wills should be signed and sealed by the testator. This was changed in 1692 to the present requirement that they should be signed by the testator or by another for him, in his presence and by his direction, the requirement of a seal being omitted (Acts, &c., Mass. Bay, vol. I., p. 46; 1784, 1 Laws 109, § 2; 1859, G. S., c. 92, § 6.) In *Michigan* all devises of land were required, by the act of 1809, to be in writing, and signed by the testator or another for him, in his presence and by his direction (2 T. L. 13, § 1.) The subsequent act of 1811 (1 T. L. 160, § 2,) required that wills should be in writing and signed by the testator "if practicable," and that they might be signed in testator's presence and by his direction by another person for him, if he was not capable of signing. The present law requires only that the will be signed by the testator or by another for him, in his presence and by his direction (1839, P. L. 220, § 5; 1871, Comp. L., § 4326; c. 154, § 5.) In *Minnesota* the law is the same as in Michigan (1851, R. S., c. 53, § 5; 1866, G. S., c. 47, § 5.) In *Mississippi* the law is the same as regards signing of wills (1821, Hutch. Code, 647, § 14; 1871, Rev. Code, § 2388.) In *Missouri* also (1808, 1 T. L. 140, § 18; 1814, 1 T. L. 405, § 25; 1821, Id. 786, § 1; 1825, P. L. 790, § 1; 1835, R. S. 617, § 4; 1845, R. S. 1078, § 4; 1855, R. S., c. 167, § 4; 1865, G. S., c. 131, § 3; 1879, R. S., § 3962.) The revision of 1845 (§ 5) required the person signing for testator to sign also as a witness and to state that he had signed for the testator. This was repealed in 1853 (P. L. 171.) In *Nebraska* the requirement was, as in Michigan, at first (1855, P. L. 63, § 45.) This was changed to a requirement that it be subscribed at theend, (1856, P. L. 93, § 2,) which is, however, omitted in subsequent statutes (1860, P. L., c. 5, § 5; 1866, R. S., c. 14, § 127; 1873, G. S., c. 17, § 127.) In *Nevada* wills must be signed and *sealed* by the testator, or by another for him, in his presence, and by his direction (1862, P. L., c. 61, § 3.) In *New Hampshire* the requirements of signing and sealing are the same as in Nevada (1822, P. L. 10, § 1; 1878, G. L., c. 193, § 6.) In *New Jersey* wills must be signed by the testator, "which signature shall be made by the testator" (1850, P. L. 280, § 1; 1851, P. L. 218, § 1; 1877, Rev. 1247, § 22; 1838, P. L. 218.) In *New York*, since the revision of 1829, wills must be signed by the testator at the end of the will (2 R. S. 56, § 40.) Before this act wills were required to be signed only by the testator, or by some other person in his presence, and by his express direction (1787, 1 Greenl. 386, § 2.) It was held in 1869 that a signature at the end of the attestation clause, with the witnesses, is sufficient, Cohen's Will, Tuck. 286. In *North Carolina*, by the act of 1784, which also applied to Tennessee, wills must be signed by the testator, or by another for him, in his presence and by his direction (1784, P. L., c. 22, § 11; 1841, P. L. 103, extending the act of 1784 to wills of personal property; 1873, Bat. Rev., c. 119, § 1.) In *Ohio* the requirement was the same until 1878 (1804, P. L. 173; 1808, 6 L. 64, § 1; 1810, 8 L. 146, § 1; 1816, 14 L. 141, § 1; 1824, 22 L. 119, § 2; 1831, 29 L. 242, § 2; 1840, 38 L. 120, § 2; 1852, 50 L. 297, § 2.) In 1878 (75 L. 838, § 4; 1880, Rev., § 5916,) the statute was changed so as to require the signature to the will, "at the end thereof." By act of 1805 (22 L. 1805, repealed in 1824, 23 L. 15), a "seal either of wax, wafer or ink" must be affixed to every will. It is not enough for the testator to sign without the witnesses, and the witnesses to sign a

the same time, (*u*) and such witnesses shall attest and shall subscribe (*x*) the will in the presence (*y*) of the testator, but no form of attestation (*z*) shall be necessary. [11]

superadded clause without the testator, Glancy *v.* Glancy, 17 Ohio St. 134, (1866) In *Oregon* wills must be signed by the testator, or for him by another, in his presence and by his direction, and such person signing for the testator must sign as an attesting witness, and state that he subscribed the will for the testator (1850, G. S. 274, §§ 4, 5; 1855, P. L. 384, §§ 4, 5.) See also vol. I., p. 257, n. In *Pennsylvania* a will must be signed by the testator at the end, unless prevented by extremity of last sickness, and in such case, by another at his request and in his presence (1833, P. L. 249, § 6; 1872, Purd. Dig. 1474, § 6.) By the act of 1848 (P. L. 16; Purd. Dig. 1474, § 7), a mark is sufficient signature. A clause stating reasons for the will added after testator's signature, invalidates the whole, Hays *v.* Harden, 6 Penna. St. 409, (1847.) In *Rhode Island* a will must be signed by the testator, or by another for him, in his presence and at his request (1857, R. S. 356, § 4; 1872, G. S. 374, § 4.) In *South Carolina* the rule as to signing is the same, by act of 1789 (5 Stats. at Large 106, § 2; 1873, R. S. 442, § 2.) In *Tennessee* likewise (1852, P. L. 260, § 4; 1858, Code, § 2162; see, too, act of 1784, c. 22, § 11.) So also in *Texas* (1840, P. L. 167, § 1; 1879, R. S., § 4859.) In *Vermont* the rule is now the same (1861, Comp. Stat. 327, § 6; 1862, G. S., c. 49, § 6.) Sealing was originally required by the act of 1797 (Dig. L. 119, § 1.) But a holograph will, with testator's name in the body but not subscribed, was held to be well executed in Adams *v.* Field, 21 Vt. 256, (1849.) In *Virginia* the rule is the same, and has not been changed since 1748 (5 Stats. at Large 456, § 7; 1785, 12 Id. 140, § 1; 1792, 1 Stats. at Large (N. S.) 88, § 1; 1840, P. L. 50, extending the above statutes to wills of personal property; 1873, Code 910, § 4.) And a holograph will, with name in body of will but no subscription, has been held sufficient, Roy *v.* Roy, 16 Gratt. 418, (1863); and see Bailey *v.* Teachle, Wythe 173 (1793); but not where an attestation clause showed the will to be incomplete, Waller *v.* Waller, 1 Gratt. 454, (1845.) In *West Virginia* a will must be signed by the testator, or by another for him, in his presence and by his direction, "in such manner as to make it manifest that the name is intended as his signature" (1868, Code, c. 77, § 3) In *Wisconsin* every will must be signed by the testator, or by some other person for him, in his presence and by his direction (1838, T. L 182, § 1; Id. 302, § 26; 1849, R. S. 353, § 5; 1878, R. S., § 2282.)

(*u*) Vol. I., p. *109.

(*x*) Vol. I., p. *82.

(*y*) Vol. I., pp. *85, *109.

(*z*) Vol. I., p. *109.

11. *Holograph* wills in general require no attestation. Such wills, when written throughout and signed by the testator, are recognized as valid by statute of Arkansas, California, District of Columbia, Florida, (formerly), Louisiana, Michigan, (formerly), Mississippi, Missouri, (formerly), North Carolina, Tennessee, Texas, Virginia and West Virginia. For greater particularity, see the several statutes, *infra*.

Whatever may have been the original will as to *acknowledgment* by the testator of his signature, such acknowledgment in the witnesses' presence is now held to be a sufficient substitute for signing in their presence in England and in most of the United States. See vol. I., pp. 208, 210, n.; Dormer *v.* Thurland, 2 P. Wms. 506, (1728); Dewey *v.* Dewey, 1 Metc. 349, (1840); Cravens *v.* Faulconer, 28 Mo. 19,

(1859.) This is expressly provided by statute in Arkansas, California, Colorado, District of Columbia, Georgia, Illinois, Iowa, Kansas, Kentucky, Nebraska, New Jersey, New York, Ohio, Virginia and West Virginia. For particular statutes, see *infra*. It was held not to be sufficient prior to the act of 1851 in New Jersey, Den *v.* Mitton, 7 Halst. 70, (1830.) And in Virginia the acknowledgment by the testator of a signature made for him by another person is insufficient, Burwell *v.* Corbin, 1 Rand. 144, (1822.) An acknowledgment by signs is sufficient, Raudenbaugh *v.* Shelley, 6 Ohio St. 317, (1856); or as testator's "act and deed," Loy *v.* Kennedy, 1 Watts & S. 396, (1841.) And, in general, such acknowledgment has been held sufficient without statutory provision, Hoffman *v.* Hoffman, 26 Ala. 435 (1855); Rash *v.* Purnell, 2 Harring., 458 (1838); Turner *v.* Cook, 36 Ind. 129, (1871); Tucker *v.* Oxner, 12 Rich. L. 141; Adams *v.* Field, 21 Vt. 256, (1849.) The signature or acknowledgment must now be made in England *simultaneously* before all the witnesses, (see vol. I., p. 253.) This is not in general required by the American statutes, and it has been held to be unnecessary in Cravens *v.* Faulconer, 28 Mo. 19, (1859.) It is required by the statutes of New Jersey, Virginia and West Virginia, (*infra.*) Others require the witnesses to sign in the presence "of each other:" Arkansas, (formerly), Connecticut and Vermont, (*infra.*) But it appears that it is not in general held sufficient for a *witness to acknowledge* his signature where he is required by statute to subscribe or sign in testator's presence, Moore *v.* King, 3 Curt. 253, (1842); Chase *v.* Kittredge, 11 Allen 59, (1865), where the signature was made before that of testator, and afterwards acknowledged by the witness. In a similar case, however, the contrary was held in Virginia, Sturdivant *v.* Birchett, 10 Gratt. 67, (1853.)

The *witness' signature* may, however, be made by *mark*, Harrison *v.* Harrison, 8 Ves. 185, (1803); Goods of Eynon, 3 L. R., P. & D. 92, (1873); Jackson *v.* Van Dusen, 5 Johns. 144, (1809), probated without question; Meehan *v.* Rourke, 2 Bradf. 385, (1853); Needham *v.* Needham, 3 Dana Ab. 452, (1802); even though a wrong name be written opposite the mark, In re Ashmore, 3 Curt. 756, (1843.) The witness is required to sign *his name* by statute in Alabama, California, District of Columbia, Kansas (formerly), Kentucky, Louisiana, Missouri, Nevada, New Jersey, Ohio, Oregon and Texas, (*infra.*) A signature of the witness by *initials* has been held sufficient, Adams *v.* Chaplin, 1 Hill Ch. (S. C.) 266, (1833.) *Guiding the hand* of the witness makes a good signature, if he is unable to write, Campbell *v.* Logan, 2 Bradf. 90, (1852); but not otherwise, Goods of Kilcher, 6 No. Cas. 15, (1848.) *Another may sign* for a witness unable to write, Montgomery *v.* Perkins, 2 Metc. (Ky.) 448, (1859); the witness making his mark and the other person writing the witness' name, Jesse *v.* Parker, 6 Gratt. 57, (1849); but not in such case unless he makes his mark, Horton *v.* Johnson, 18 Ga. 396, (1855.) And under the Pennsylvania act requiring a will to be "attested," it has been held that the witness need not *sign* at all, Hight *v.* Wilson, 1 Dall. 94, (1784); where, however, witness' signature is necessary, a *seal* is insufficient, Goods of Byrd, 3 Curt. 117, (1842.)

No *attestation clause* is necessary, Fry's Will, 2 R. I. 88, (1852); Bryan *v.* White, 2 Robert. 315, (1850); much less any particular form, Croft *v.* Pawlet, 2 Stra. 1109, (1739); Doe *v.* Burdett, 4 Ad. & El. 2, (1835); Leaycraft *v.* Simmons, 3 Bradf. 35, (1854.)

The *position* of the witness' signature is not fixed by the statute of 1 Vict., c. 26. The witness is required by statute to sign at the end of the will in Arkansas, California, Nebraska and New York; and to "subscribe" in Alabama, District of

Columbia, Connecticut, Delaware, Georgia, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia and Wisconsin. This word is also used in the act of 29 Car. II., c. 3, and under it no particular position is held necessary in England, In re Chamney, 1 Rob. 757, 7 No. Cas. 70, (1849); Roberts *v.* Phillips, 4 El. & Bl. 450, (1855); the former case being under an endorsement on the fourth page and held sufficient. And under the Mississippi statute, which does not require "subscription," such endorsement on the same paper has been held good, Murray *v.* Murphy, 39 Miss. 214, (1860.) But under the Kentucky statute requiring subscription, an endorsement has been held to be insufficient, Soward *v.* Soward, 1 Duv. 132, (1863.) And if the will is written on several sheets, the witness need not attest each sheet, see vol. I., p. 217. But where the first four pages were signed by the testator and the witnesses, and the fifth page by the testator alone, leaving the will incomplete, probate was refused in Ewen *v.* Franklin, Dea. & Sw. 7, (1855); but allowed in a precisely similar case in Conboy *v.* Jennings, 1 Thomp. & C. 622, (1873), where the last page was wholly unnecessary to the will, and after being rejected, left the will complete.

The witness is required to add to his signature his *residence* in the States of California and New York, and formerly in Nebraska, the omission of which does not affect the validity of the will, but subjects it to a penalty in New York, and formerly in Nebraska.

The question of *competency* of witnesses to a will has in a great measure disappeared with the disability of witnesses in general. Although no longer in the English statute, (1 Vict., c. 26,) the requirement that a witness to a will be "competent" or "credible" is still found in the statutes of nearly all of the United States (see *infra.*) Incompetency is a question to be determined, in general, at the time of the attestation. Amory *v.* Fellowes, 5 Mass. 229, (1809); Patten *v.* Tallman, 27 Me. 28, (1847); Anstey *v.* Dowsing, 2 Stra. 1253, (1746.) As to subsequent incompetency, see note to Section XIV., *infra.* In *Massachusetts* a wife, incompetent up to testator's death, cannot prove a will as witness, Pease *v.* Allis, 110 Mass. 157, (1872.) As to competency of executor to be a witness, see note to Section XVII., *infra.* As to other particulars, see the several statutes, *infra.*

In all the states, except Louisiana, New York and Pennsylvania, the witnesses are required to sign the will *in the testator's presence.* In Arkansas, California, Nebraska and New York it must be "at the request" of the testator. As to what constitutes "presence" under such requirements, see vol. I., p. 221, *et seq.*

In *Alabama*, by the northwestern ordinance of 1787, three witnesses were originally required. By the act of 1806 (Toulm. Dig. 883, § 2,) these witnesses were required to subscribe in the testator's presence. So, too, by the code of 1852, (§ 1611; 1876, Code, § 2294,) by which, however, the number of witnesses was reduced to two, who must subscribe their names in testator's presence. In *Arkansas* wills must be attested by two or more competent witnesses subscribing in the presence of the testator and of each other (1815, Comp. T. L. 556, § 1.) By the statute now in force, a testator must sign, or acknowledge his signature in the presence of each witness, and the witness must sign at his request at the end of the will (1847, R. S., c. 170, § 4; 1873, R. S., § 5763.) A holograph will is, however, valid without subscribing witnesses if proved by three witnesses, except as against a formally attested will (Id.) In *California* a will must be attested by two competent witnesses subscribing their names in the

testator's presence at the end of the will, and at the testator's request (1872, Code, § 6276.) The earlier statute did not fix the position of the witness' signature, nor require the testator's request (1850, P. L., c. 72, § 3.) The code also provides for an exception in case of holograph wills, written, dated, and signed by testator, and subject to no other form, though made out of the state (§ 6277.) The code requires only that the testator sign *or acknowledge* his signature before the witnesses (§ 6276), and the witnesses must add their residence to their signature (§ 6278.) In *Colorado* wills must be "attested" in the presence of the testator by two credible witnesses (1861, P. L. 398, § 2; 1867, R. S., c. 90, § 2; 1877, G. L., § 2789.) The former of these acts contained a provision, since omitted, requiring the witnesses to prove that they saw testator sign, or heard him acknowledge the signature to the will, and believed him to be of sound mind and memory at the time. In the *District of Columbia* wills must be signed in the presence of two credible witnesses, who shall subscribe their names in testator's presence (1816, Code 77, § 75; 1857, Rev. Code, c. 52, § 5); and this latter statute provides that no particular form of attestation shall be necessary, and that the will may be acknowledged instead of signed by testator in witnesses' presence; and also excepts holograph wills. In *Connecticut* by the act of 1784 (Rev. Code 115, § 3,) three witnesses were required for a valid devise of real property. So, too, (1821, R. S. 199, § 2; 1838, Comp. S., c. 1, 2.) § This was extended in 1848 to all wills (1848, P. L. 36; 1849, R. S. 345, § 2; 1854, Stats. 483, § 2; 1866, G. S. 401, § 2; 1875, G. S. 369, § 2,) "all of them subscribing in his presence and in the presence of each other." In *Delaware* wills must be "attested and subscribed" by two or more "credible" witnesses (1753, 1 St. L. 342, § 2; 1852, Rev. Code 272, § 3; ed. 1874, p. 508, § 3,) in testator's presence. In *Florida* the rule is the same, except that three witnesses are required, and they need not be "credible" (1822, P. L. 52, § 1; 1823, P. L. 101, § 1; 1828, P. L. 141, § 51.) In the first of these statutes holograph wills are excepted. In *Georgia* wills must be "attested and subscribed" in testator's presence by three "competent" witnesses (1858, Code, § 2378; 1873, Code, § 2414.) "A witness may attest by his mark, provided he can swear to the same, but one witness cannot subscribe the name of another, even in his presence and by his direction" (§ 2415.) Testator's acknowledgment of his signature is sufficient (§ 2418.) In *Illinois* wills must be attested in the presence of the testator by two or more credible witnesses, of whom two must make oath that they were present and saw testator sign, and believed him to be of sound mind, memory and judgment, and since 1829 it is provided that an acknowledgment of his signature by the testator shall be equivalent to his signing in the witnesses's presence (1819, P. L. 231, § 22; 1829, Rev. Code 192, § 2; 1833, P. L. 611; 1845, R. S. 536, § 2; 1872, R. S., c. 148, § 2.) In *Indiana* wills must be "attested and subscribed" by two or more competent witnesses in testator's presence (1818, R. S. 1824, c. 45, § 5; 1831, P. L. 272, § 13; 1838, Rev. 314, § 13; 1852, R. S. 313, § 18; 1876, 2 R. S. 575.) In *Iowa* wills must be attested by two credible witnesses, who were required before the code to sign in testator's presence, and who must also prove, on oath, that they were present and saw the testator sign, or heard him acknowledge the will and believe him to have been of sound mind and memory at the time (1839, T. L. 471, § 2; 1843, P. L. 667, § 5; 1873, Code, § 2326.) In *Kansas* every will must be attested by two competent witnesses in testator's presence, who, before the act of 1859, were required to "subscribe their names," and who, by the act of 1865, are required to "subscribe," and must prove that they saw testator sign, or

heard him acknowledge his signature to the will (1855, T. L., c. 164, § 3; 1859, P. L., c. 131, § 5; 1862, Comp L., c. 215; 1865, P. L., c. 86, § 2; 1868, G. S., c. 117, § 2; ed. 1878, § 6114.) In *Kentucky* wills other than holograph must be subscribed or acknowledged by the testator in the presence of two credible witnesses, who shall subscribe in testator's presence "with their names" (1851, R. S., c. 106, § 5; 1873, G. S., c. 113, § 5; so, too, act of 1797, 1 Litt. 611, § 1, except the words quoted above.) An endorsement is not a subscribing, Soward *v.* Soward, 1 Duv. 132, (1863.) In *Louisiana* three resident or five non-resident witnesses must sign; or if they cannot write, one may sign for all, in case of a nuncupative or open will, by public act before a notary. Nuncupative wills under private signature must be signed in the presence of five resident witnesses, of whom two at least must sign their names. Mystic or sealed wills must be sealed up in the presence of seven witnesses (1825, Code, § 1571, *et seq.;* 1870, Id., § 1578, *et seq.*) Holograph wills, written and signed by the testator, may be made out of the state without attestation (1825, Code, § 1581; 1870, Id., § 1588.) Women, males under the age of sixteen, insane, deaf, dumb and blind persons and convicts are all incompetent witnesses (1825, Code, § 1584; 1870, Id., § 1591.) In *Maine* three "credible" witnesses are required (1821, P. L. 137, § 2; 1871, R. S. 563, § 1; 1859, P. L. 111, "not beneficially interested,") who must "subscribe in his presence." In *Maryland* devises of real property must be "attested and subscribed" in testator's presence by three or four "credible" witnesses (1798, P. L., c. 101, sub. c. 1, § 4; 1860, Code, art. 93, § 301; 1878, Rev. Code 420, § 4.) In *Massachusetts* wills must be "attested and subscribed" in testator's presence by three witnesses (Acts, &c., Mass. Bay, A. D. 1692, vol. I., p. 46; 1784, 1 L. 109, § 2; 1859, G. S., c. 92, § 6,) but only one witness is requisite to prove the will (1818, P. L. 646.) In *Michigan* the territorial law of 1809 (2 T. L. 13, § 1,) required attestation by "three credible witnesses," signing in testator's presence. This was changed in 1811 (1 T. L. 160, § 2,) to two, and holograph wills were excepted. The act of 1839 (P. L. 220, amending R. S. 1838, p. 271, § 5,) requires that the will be attested and subscribed in the presence of the testator by "three competent witnesses," now changed again to two (1857, Comp. L, c. 92, § 4326; 1871, Comp. L., c. 154, § 5,) holograph wills being no longer provided for. In *Minnesota* wills must be "attested and subscribed" in testator's presence by two competent witnesses (1851, R. S., c. 53, § 5; 1866, G. S., c. 47, § 5, ed. 1878.) In *Mississippi* holograph wills are excepted. Other wills must be "attested" in testator's presence by three credible witnesses for real property and one or more for personalty (1821, Hutch. Code 649, § 14; 1871, Rev. Code, § 2388.) And an endorsement upon the same paper has been held to be a sufficient signing, Murray *v.* Murphy, 39 Miss. 214, (1860.) In *Missouri* holograph wills were excepted until 1835. Other wills must be attested by two (prior to 1821, three,) competent witnesses, subscribing their names in testator's presence (1808, 1 T. L. 140, § 18; 1814, Id. 405, § 25; 1821, Id. 786, § 1; 1825, R. L. 790, § 1; 1835, R. S. 617, § 4; 1845, R. S. 1078, § 4; 1855, R. S., c. 167, § 4; 1865, G. S., c. 131, § 3; 1879, R. S., § 3962.) In *Nebraska* all wills must be signed or (since 1856) acknowledged by the testator in the presence of two competent witnesses, and the witnesses must sign the will at the end thereof, at testator's request (1855, P. L. 63, § 45; 1856, P. L. 93, § 2,) and each witness must write his residence opposite to his name under a penalty of $50 (1856, P. L. 93, § 3.) Since 1860 it need only be signed by the testator, and "attested and subscribed" in the presence of the testator by two or more competent witnesses (1873, G. S., c. 17, § 127.) In *Nevada* wills must be attested by two competent witnesses subscribing their names in testator's presence (1862, P. L.

58, § 3; Comp. L., c. 37, § 3.) In *New Hampshire* wills must be "attested and subscribed" in testator's presence by three or more credible witnesses (1822, P. L. 10, § 1; 1878, G. L., c. 193, § 6.) In *New Jersey* wills must be signed or (since 1851) acknowledged by the testator in the presence of two witnesses (before 1851, three, except in East Jersey, from 1682 to 1698, act of 1682, E. Jersey, Leam. & Spi. 236; act of 1698, E. Jersey, Leam. & Spi. 371; act of 1713, Pat. Rev. 5, Allinson 28; 1851, P. L. 218, § 1; 1877, Rev. 1247, § 22,) and the witnesses must be present at the same time and subscribe their names in the presence of the testator (1851, 1877, *supra*.) In *New York* the act of 1787 (1 Greenl. 386, § 2,) required wills to be attested and subscribed in testator's presence by three or more credible witnesses. The Revised Statutes of 1829 changed the number of witnesses to two, and required the testator to sign or acknowledge his signature in the presence of each witness, and that the will be signed by each witness at the end thereof, at testator's request (2 R. S. 56, § 40,) and that each witness add his residence to his signature, under a penalty of $50, but the omission to do so does not affect the validity of the will (2 R. S. 56, § 41.) In *North Carolina* (and *Tennessee*) provision was made in 1784 (c. 10, § 5; N. C. R. S. 1821, c. 225, § 5; N. C. Bat. Rev. 1873, c. 119, § 1,) for holograph wills found among testator's valuable papers, or lodged by him with some person for safe keeping, with the testator's name "subscribed thereto or inserted in some part of such will," on proof of his handwriting by three witnesses. Other wills must be signed in the presence of at least two disinterested witnesses, and subscribed by them in testator's presence, in North Carolina (1784, P. L., c. 22, § 11; 1821, R. S., c. 204, § 11; 1873, Batt. Rev., c. 119, § 1.) For laws of Tennessee, see *infra*. In *Ohio* wills must be attested by two or more "competent" (until 1816, "creditable, disinterested," &c., from 1816 to 1878, "credible,") witnesses, who must subscribe their names in testator's presence, and (since 1824) must have seen him subscribe his name or heard him acknowledge his signature (1804, P. L. 173; 1808, 6 Laws 64, § 1; 1810, 8 L. 146, § 1; 1816, 14 L. 141, § 1; 1824, 22 L. 119, § 2; 1831, 29 L. 242, § 2; 1840, 38 L. 120, § 2; 1852, 50 L. 297, § 2; 1878, 75 L. 838, § 4; 1880, Rev., § 5916.) In *Oregon* wills must be "attested" by two competent witnesses subscribing their names in testator's presence (1850, G. S. 274, § 4; 1855, P. L. 384, § 4; Deady Comp. L. 1863, p. 936, § 4.) In *Pennsylvania* wills must be proved by the oaths or affirmations of two or more competent witnesses (1833, P. L. 249, § 6; 1872, Purd. Dig. 1474, § 6.) Under this act it has been held that a will need not be subscribed by witnesses nor proved by subscribing witnesses. In *Rhode Island* devises of land must be "attested and subscribed" by two witnesses (1872, G. S. 373, § 4; 1857, R. S. 356, § 4, requiring three witnesses,) in the devisor's presence. In *South Carolina* the statute of frauds, 29 Car. II., c. 3, was enacted in 1733 (3 Stats. at Large 341, § 2; and see act of 1789, 5 Id. 106, § 2; 1873, R. S. 442, § 2.) The revised statutes of 1873 require all wills to be "attested and subscribed" in testator's presence by three or more "credible" witnesses. In *Tennessee* the law as to holograph wills and as to attestation by witnesses is the same as in North Carolina, *supra* (1784, P. L., c. 10, § 5; c. 22, § 11; 1858, Code, §§ 2162, 2163; 1871, Comp. S., §§ 2162, 2163,) but applies only to real property. In *Texas* holograph wills need not be attested (1879, R. S., § 4860; 1840, P. L. 167, § 1.) Other wills must be "attested" by two or more credible witnesses, above the age of fourteen years, subscribing their names in testator's presence (1879, R. S., § 4859; 1840, *supra*.) In *Vermont* three witnesses are required (1779, P. L. 361; 1797, Dig. L. 119, § 1;

EXECUTION OF TESTAMENTARY APPOINTMENTS.

X. (*a*) And be it further enacted, That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.[12]

Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

WILLS OF SOLDIERS AND SEAMEN.

XI. Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act.[13]

Soldiers' and mariners' wills excepted.

1821, Comp. L. 334, § 17; 1851, Comp. S. 327, § 6; 1862, G. S., c. 49, § 6,) by whom the will must be "attested and subscribed in the presence of the testator and of each other." In *Virginia* wills other than holograph must be signed or acknowledged in the presence of two or more competent witnesses, and by them subscribed in testator's presence, they being "present at the same time" (1748, 5 Stats. at Large 456, § 7; 1785, 12 Id., c. 61, § 1; 1792, 1 Id. (N. S.) 88, § 1; 1823, P. L. 27, § 2; 1840, P. L. 50, extending to wills of personalty what before only applied to devises of land; 1873, Code 910, § 4,) but no form of attestation is necessary. In *West Virginia* wills other than holograph must be signed or acknowledged by testator in the presence of two competent witnesses "present at the same time" and subscribing in testator's presence (1868, Code, c. 77, § 3.) In *Wisconsin* wills must be "attested and subscribed" in testator's presence by two "competent" witnesses (1838, T. L. 182, § 1, requiring three witnesses and applying only to devises; 1838, Id. 302, § 26, extending above act to wills of personalty; 1849, R. S. 353, § 5; 1878, R. S., § 2282.)

(*a*) Vol. I., p. *31.

12. In the *District of Columbia* the execution of a power of appointment by will must be sufficient in form to pass testator's own property, and if so it is valid notwithstanding failure to comply with other requirements of the instrument conferring the power (1857, Rev. Code, c. 52, § 6.) So in *Kentucky* (1851, R. S., c. 106, § 6; 1873, G. S., c. 113, § 6.) In *New York* likewise (1829, 1 R. S. 736.) So in *North Carolina* (1845, P. L. 125, § 9; 1873, Batt. Rev., c. 119, § 4.) So in *Virginia* (1873, Code 910, § 5.) And in *West Virginia* (1868, P. L. 92, § 4; Code, c. 77, § 4.)

13. This section (XI.) is a copy of 29 Car. II., c. 3, § 23. See vol. I., p. 238. It is substantially, if not verbally, enacted in *Alabama* (1852, Code, § 1617; 1876, Code, § 2300); *Arkansas* (1847, R. S., c. 170, § 25; 1873, R. S., § 5776);

PETTY OFFICERS, SEAMEN AND MARINES.

Act not to affect certain provisions of 11 G. IV. and 1 W. IV., c. 20, with respect to wills of petty officers, and seamen and marines.

XII. And be it further enacted, That this act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, entitled, "An act to amend and consolidate the Laws relating to the Pay of the Royal Navy, respecting the Wills of Petty Officers

California (1850, P. L., c. 72, § 7; 1872, Code, § 6289); *District of Columbia*, (1857, Rev. Code, c. 52, § 10,) limited, however, to $200; *Indiana* (1807, P. L. 86, § 37; 1818, P. L. 152, § 42; 1829, P. L. 46, § 35; 1831, P. L. 274, § 17; 1838, Rev. 315, § 17; 1852, R. S. 315, § 21; 1876, R. S. 576, § 21); *Iowa* (1880, Rev., § 2325, requiring two witnesses; 1843, P. L. 667, § 6); *Kansas* (1855, T. L., c. 164, § 22; 1859, P. L., c. 131, § 4, requiring probate of such will within one year); *Kentucky* (1797, 1 Litt. 611, § 8,) but by existing statutes such will must be made within ten days of testator's death in the presence of two competent witnesses who were called on by the testator to bear witness, and must within sixty days be reduced to writing and subscribed by at least one of the witnesses (1851, R. S., c. 106, § 7; 1873, G. S., c. 113, § 7); *Lousiana*, by a soldier in service before a commissioned officer and two witnesses, or if sick or wounded, before a physician and two witnesses, and in either case to be void in six months after his return home; by a sailor at sea before the captain or master and three witnesses, to be void in three months after his return home, and all gifts to persons other than relations on the ship being declared invalid (1825, Code, §§ 1590–1597; 1870, Id., §§ 1597–1604); *Maine* (1821, P. L. 137, § 4; 1871, R. S. 563, § 18); *Maryland* (1810, P. L., c. 34, § 2; 1860, Code, art. 93, § 307; 1878, Rev. Code, art. 49, § 11); *Massachusetts* (1692, Acts Mass. Bay, vol. I., p. 47; 1784, 1 Laws 109, § 6; 1859, G. S., c. 92, § 9); *Michigan* (1809, 2 T. L. 13, § 5; 1811, 1 T. L. 160, § 2; 1871, Comp. L., § 4327); *Minnesota* (1851, R. S., c. 53, § 7; 1866, G. S., c. 47, § 6); *Mississippi* (1821, Hutch. Code 647, § 21; 1871, Rev. Code, § 2395; and as to Miss. Territory in 1806, see Toulm. Dig. 883, § 6); *Missouri* (1814, Terr. L. 133; 1821, 1 T. L. 786, § 5; 1835, R. S. 617, § 7; 1845, R. S. 1078, § 24; 1855, R. S., c. 167, § 23; 1865, G. S., c. 131, § 22; 1879, R. S., § 3985); *Nebraska* (1855, P. L. 63, § 44; 1860, P. L. 77, § 7; 1866, R. S., c. 14, § 129; 1873, G. S., c. 17, § 129); *New Hampshire* (1822, P. L. 10, § 4; 1878, G. S., c. 193, § 7); *New Jersey* (1795, Pat. Rev. 189, § 19; 1877, Rev. 1246, § 16); *New York* (1787, 1 Greenl. 386, § 21; 1829, 2 R. S. 56, § 22,) and as early as 1656 (N. Y. Col. MSS. XVIII., p. 24,) a soldier marching against the enemy might make a will, to be proved by witnesses on their arrival at the first garrison; *Oregon* (1850, G. S. 274, § 24; 1855, P. L. 384, § 24); *Pennsylvania* (1833, P. L. 249, § 8; 1872, Purd. Dig. 1474, § 9); *Rhode Island* (1857, R. S. 356, § 8; 1872, G. S. 374, § 8); *South Carolina* (1873, R. S. 447, § 28); *Texas* (1840, P. L. 167, § 9; 1879, R. S., § 4866); *Vermont* (1797, Dig. L. 119, § 5; 1851, C. S. 403, § 9; 1862, G. S., c. 49, § 9); *Virginia* (1748, 5 Stats. at Large 457, § 13; 1785, 12 Id. 141, § 8; 1835, P. L. 43; 1873, Code 910, § 6); *West Virginia* (1868, Code, c. 77, § 5); *Wisconsin* (1838,

and Seamen in the Royal Navy, and Non-commissioned Officers of Marines, and Marines, so far as relates to their Wages, Pay, Prize Money, Bounty Money and Allowances, or other Moneys payable in respect of Services in her Majesty's Navy."

PUBLICATION.

Publication not to be requisite.

XIII. And be it further enacted, That every will executed in manner hereinbefore required shall be valid without any other publication thereof. [14]

ATTESTING WITNESSES' COMPETENCY.

Will not to be void on account of incompetency of attesting witness.

XIV. (*b*) And be it further enacted, That if any person who shall attest the execution of a will shall, at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness *to prove the execution thereof, such will shall not on that account be invalid. [15]

T. L. 302, § 27; 1849, R. S. 353, § 7.) In *Delaware* mariners at sea were originally excepted in the act of 1753 requiring wills to be in writing and attested (1 St. L. 342, § 7.)

14. In *New Jersey* publication of a will is required by statute, and the testator must "declare it to be his will" (1838, P. L. 218, repealed 1843, P. L. 75, and substantially re-enacted 1850, P. L. 280, § 1; 1851, P. L. 218, § 1; 1877, Rev. 1247, § 22.) Publication was required as early as 1713 (Pat. Rev. 5; Allinson 28.) So in *New York* (1829, 2 R. S. 64, § 40,) under which act silent assent is not sufficient, Heyer *v.* Burger, Hoffm. 1, (1839,) and in *California* (1850, P. L., c. 72, § 3; 1872, Code, § 6276,) and *Arkansas* (1847, R. S., c. 170, § 4; 1873, R. S., § 5763,) and *Nebraska* (1856, P. L. 93, § 2.) In *Louisiana* the code of 1825 (§ 1577; ed. 1870, § 1584,) requires the testator on sealing and delivering a mystic or secret will to the notary in the presence of witnesses, to "declare it to be his will." In *Georgia* the code of 1873 provides (§ 2418) that "knowledge of the contents of the paper by the testator is necessary to its validity, but usually where the testator can read and write, his signature or acknowledgment of his signature is sufficient." For the rule as to publication in the absence of statutory requirements, see vol. I., p. 207, *et seq.*; 4 Kent 515. In the United States it has been held *unnecessary* in Mississippi, Watson *v.* Pipes, 32 Miss. 451 (1856); South Carolina, Verdier *v.* Verdier, 8 Rich. L. 135, (1855); Vermont, Dean *v.* Dean, 27 Vt. 746, (1855)—and *necessary* in Massachusetts, Swett *v.* Boardman, 1 Mass. 258, (1804.)

(*b*) Vol. I., p. *111.

15. In *Alabama* the subsequent incompetency of a witness does not affect the validity of a will (1852, Code, § 1612; 1876, Code, § 2295) So in *California* (1850, P. L., c. 72, § 4; 1872, Code, § 6280); *District of Columbia* (1857, Rev. Code, c. 52, § 23); *Indiana* (1876, 2 R. S. 575, § 18); *Kentucky* (1851, R. S., c. 106, § 13; 1873, G. S., c. 113, § 13); *Maine* (1871, R. S. 563, § 2); *Massachusetts* (1859,

GIFT TO ATTESTING WITNESSES.

Gifts to an attesting witness to be void.

XV. (c) And be it further enacted, That if any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.[16]

G. S., c. 92, § 6); *Minnesota* (1851, R. S., c. 53, § 5; 1878, G. S., c. 47, § 5); *Nebraska* (1860, P. L. 77, § 5; 1866, R. S., c. 14, § 127; 1873, G. S., c. 17, § 127); *North Carolina* (1873, Batt. Rev., c. 119, § 13); *Ohio* (1878, 75 L. 838, § 15; 1880, Rev., § 5927); *Vermont* (1851, Comp. S. 327, § 10; 1862, G. S., c. 49, § 10); and *Wisconsin* (1878, R. S., § 2282.) See also vol. I., pp. 190, 225, n.

(c) Vol. I., p *72.

16. This section is part of the earlier act of 25 Geo. II., c. 6, § 1. It has been enacted substantially in many of the United States. Attention is called to the feature in many American statutes permitting such gifts to stand, *if the witness is not necessary* to the probate of the will. This is found in the statutes of Alabama, Arkansas, California, Colorado, Connecticut, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, Ohio, Texas, Vermont, Virginia and West Virginia, *infra*.

It is further provided that a gift by will to an attesting witness who would be entitled to a share of the estate *in case of intestacy*, shall be good *pro tanto*. This is the case in Alabama, Arkansas, California, Colorado, District of Columbia, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New York, Ohio, South Carolina, Virginia, West Virginia, and Wisconsin, *infra*.

The provisions of the act of 25 Geo. II., c. 6, as to *refusal* or renunciation of the gift by the witness, or *actual payment* made to him before probate, and prohibiting subsequent payment or compensation in such case, are included in whole or in part in the statutes of Arkansas, New Jersey, and Oregon, and formerly also in Kansas, Maine, Maryland, Massachusetts, Michigan, Missouri, New York, South Carolina, Vermont and West Virginia.

The *husband or wife* of the witness is also excluded in the District of Columbia, Connecticut, Kentucky, Massachusetts, North Carolina, South Carolina and Virginia; and especially excepted in Georgia. The history of this act, as well as of the Massachusetts statute framed upon it, can hardly be told better than in Judge Gray's words in 1871, in Sullivan *v.* Sullivan, 106 Mass. 476: "The English statute of frauds required wills devising lands to be attested and subscribed in the presence of the devisor by three or four credible witnesses, St. 29 Car. II., c. 3, § 5; and that provision was re-enacted here

in the first year of the province, Prov. St. 4 W. & M. (1692-3), c. 15, § 3; 1 Mass. Prov. Laws (State ed.) 46; Anc. Chart. 235. In Holdfast *v.* Dowsing, 2 Stra. 1253, where a testator charged all his estate, real and personal, with legacies, to one of the subscribing witnesses and to his wife, and with an annuity to the wife, the Court of King's Bench held that the statute of frauds certainly meant that the 'credible witnesses' should not be such as claimed a benefit by the will; and that, even if the tender to the husband, at the trial, of the amount of the two legacies, would remove the objection on that ground, (which the court thought it would not), yet the charge upon the real estate of the annuity to the wife made the husband an incompetent witness. Although the doctrine as to the legacies has been since controverted in England, upon the ground that the incompetency of the witnesses was to be determined at the time of the proof, and not at that of the execution of the will. The incompetency of either husband or wife to be a witness to a devise to the other, which the witness could not release, has never been doubted, Windham *v.* Chetwynd, 1 Burr. 414, 424; S. C., 1 W. Bl. 95, 100; Bul. N. P. 265. The case of Holdfast *v.* Dowsing was taken by writ of error to the exchequer chamber, and after argument and before judgment there was compromised by the parties, and gave occasion to the statute of 25 Geo. II., c. 6; 1 W. Bl. 8; 1 Ves., Sr., 503; 2 Bl. Com. 377. The reason of this, as stated by Sir William Blackstone in his commentaries, was, that the determination in the King's Bench 'alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom that depended upon devises by will,' because it 'would not allow any legatee, nor by consequence a creditor, where the legacies were charged on the real estate, to be a competent witness to the devise.' The statute of 25 Geo. II., c. 6, accordingly provided in § 3 that to the execution of wills already made any attesting witness to whom any legacy was given, whether charged on lands or not, might be admitted as a witness, upon payment, release or tender of his legacy; and, by §§ 1, 2, that in future wills any attesting witness 'to whom any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate,' (except charges on lands for payment of debts), 'shall be thereby given or made,' should be admitted as a witness to the will, within the intent of the statute of frauds, and 'such devise, legacy, estate, interest, gift or appointment shall, so far only as concerned such person attesting the execution of such will, or any person claiming under him, be utterly null and void;' and that charges of debts upon lands should not make any creditor an incompetent witness. All these provisions were re-enacted in our statute of 1783, c. 24, §§ 11-13; and the provision of statute of 25 Geo. II., c. 6, § 3, and statute of 1783, c. 24, § 13, for removing the interest of a witness by payment, release or tender, was omitted in the revision of our statutes in 1836. But neither the statute of 25 Geo. II., nor the statute of 1783, contained any provision as to devises to the wife or husband of an attesting witness, notwithstanding the general attention which had been called to the subject by the case of Holdfast *v.* Dowsing. In 1822, a case was brought before the Court of King's Bench, in which a testator devised, upon the determination of an estate for life, an estate in fee to the wife of one of the attesting witnesses, and the wife died before the determination of the estate. It was argued that if, before the statute of Geo. II., the husband would have been an incompetent witness, the clear intent of that statute was to restore the competency of the attesting witness in all cases of benefit arising to him under the will, and to avoid the will 'so far only' as concerned the person attesting the execution, or any person claiming under him; and since

that statute, therefore, no will could be void by reason of interest arising under it to any attesting witness, further than regarded the interest of such witness or any person claiming under him; and consequently the will was duly attested. To which it was answered that the statute of Geo. II. applied only to cases where the interest taken under the will was destroyed by the statute itself; that the husband took no estate or interest under the will; that his wife, indeed, took an estate under the will, and by operation of law, he, in right of his wife, derived a beneficial interest from that estate, which they might have sold during her life, and which would have given him an estate by the curtesy, if she had survived the life tenant; but that the estate of the wife was not destroyed by the statute, and consequently the derivative beneficial interest, which the husband took in right of his wife only was not extinguished; and that, independently of the question of interest, it was a general rule that a husband or wife could not in any case be a witness for the other, as was held in Davis *v.* Dunwoody, 4 T. R. 678. And the court was of opinion that the will was not duly attested, Hatfield *v.* Thorp, 5 B. & Ald. 589. The point thus adjudged upon the application of the statute of Geo. II. is summed up by Mr. Jarman as follows: 'That it applied only where the witness took a direct interest under the will, and not when it arose consequentially. Thus in Hatfield *v.* Thorp, where one of the three attesting witnesses to a will was the husband of a devisee in fee of a freehold estate, and would *jure uxoris* have derived an interest in the lands, it was held that the devise was not within the statute, and consequently that the attestation was insufficient.' And such continued to be the law of England until 1837, when the statute of 1 Vict., c. 26, extended the disqualification to take beneficially under the will to the husband or wife of the attesting witness, 1 Jarman on Wills 65–67. In neither of the revisions of our own statutes in 1836 and 1860, is there any express provision introduced upon this point, Rev. Stats., c. 62, § 6; Gen. Stats., c. 92, § 6. And the statutes removing the objections to the competency of witnesses on the grounds of interest and of the relation of husband and wife are expressly declared not to apply to attesting witnesses to a will or codicil, Gen. Stats., c. 131, § 15; 1859, c. 393, § 2."

In *Alabama* it was enacted by the territorial law of 1806, applying to the whole Mississippi territory (Toulm. Dig. 883, § 9,) that a gift by will to a subscribing witness, if the will was not sufficiently attested without him, should be void except so far as he would have been entitled to take in case of intestacy, and such witness should be competent and compellable to testify. In *Arkansas* a gift to a subscribing witness, if the will is not sufficiently attested without him is void, and such witness is competent to prove the will, (1847, R. S., c. 170, § 39; 1873, R. S., § 5804,) but such witness may take so much of such gift as does not exceed any share of testator's estate to which he would be entitled in case of intestacy (1847, *supra*, § 40; 1873, *supra*, § 5805); but if there are sufficient other witnesses the will and the gift are valid (*supra*, §§ 41, 5806); and a charge of debt due to the witness is valid (*supra*, §§ 42, 5807); and the will is valid and the witness competent, if the legacy has been already paid, released or renounced before probate (*supra*, §§ 43, 5808,) or if the witness has died before testator (*supra*, §§ 44, 5809); but payment, refusal or renunciation of the legacy in such case before probate is final and irrevocable, and the witness cannot afterward receive any payment or compensation (*supra*, §§ 45, 5810.) In *California* a gift to a subscribing witness, who is necessary to the proper attestation of a will, except a charge of debt due him, is void (1850, P. L., c. 72, § 5; 1872, Code, § 6282); but

such witness may take the share to which he would be entitled in case of intestacy (1850. *supra*, § 6; 1872, Code, § 6283.) In *Colorado* a gift to a witness, who is necessary to the proper attestation of the will, is void so far as it exceeds the share which such witness would have taken in case of intestacy, and such witness is competent to prove the will (1867, R. S., c. 90, § 5; 1877, G. L., § 2792.) In the *District of Columbia* a gift to a subscribing witness, or the husband or wife of such witness, is void so far as it exceeds the share which such witness would have been entitled to take in case of intestacy, and such witness is competent to prove the will (1857, Rev. Code, c. 52, § 24.) In *Connecticut* a gift by will to any subscribing witness other than an heir-at-law is void, and the witness is competent to prove the will (1807, Stat. Laws 683; 1821, R. S. 199, § 3; 1838, Comp. S., tit. 31, c. 1, § 3); and also, since 1848, a gift to the husband or wife of such witness (1848, P. L. 36; 1854, Stats. 483, § 3; 1866, G. S. 401, § 3; 1875, G. S. 369, § 3.) But these acts do not apply where the will is "otherwise legally attested," (§ 3.) In *Delaware* an inhabitant of a county to which a legacy is given is made a competent witness by statute (1829, P. L. 221, § 3; 1852, Rev. Code 272, § 4; ed. 1874, p. 508.) In *Georgia* the English statute of 25 Geo. II., c. 6, is one of those enumerated by Schley (p. 384) as in force. The code now provides that a gift to a subscribing witness shall be void and the witness competent to prove the will, but a gift to the wife of such witness shall be valid (1858, Code, § 2382; 1873, Code, § 2417.) In *Illinois* a gift to an attesting witness, who shall be necessary to the proper probate of the will, is void so far as it exceeds any share to which he might have been entitled in case of intestacy, and such witness is competent to prove the will (1829, Rev. Code 195, § 10; 1833, P. L. 615; 1845, R. S. 539, § 11; 1872, R. S., c. 148, § 8.) So in *Indiana*, since 1852 (R. S. 316, § 29.) Before that time the statute simply prohibited gifts to attesting witnesses (1831, P. L. 273, § 16; 1838, Rev. 315, § 16.) None of the above statutes provide that such witness shall thereupon become competent. But such witness may take such share as he would have in case of intestacy (1876, 2 R. S. 578, § 29.) In *Iowa* (1839, P. L. 475, § 11; 1843, P. L. 667, §§ 7, 8; 1873, Code, §§ 2327, 2328,) a gift to an attesting witness, who shall be necessary to the proper probate of the will, is void so far as it exceeds any share to which he might have been entitled in case of intestacy. In *Kansas*, to same effect (1855, T. L., c. 164, §§ 36-38; 1859, P. L., c. 131, §§ 6, 7; 1862, Comp. L., c. 215; 1865, P. L., c. 86, § 11; 1868, G. S., c. 117, § 11; ed. 1878, § 6123.) It was also provided in the act of 1855, not re-enacted, that the witness should be competent if he had been paid, or had refused or released the gift, or if he had died before testator; but in case of payment, refusal or release, there could be neither subsequent repayment nor compensation (§§ 40-43.) In *Kentucky* a gift to a witness, *or to the husband or wife of a witness, if the will cannot be proved without such witness*, is void, so far as it exceeds any share to which he might have been entitled in case of intestacy, and such witness is competent to prove the will (1851, R. S., c. 106, § 13; 1873, G. S., c. 113, § 13.) These provisions, except the part in italics, are copied from the act of 1785 (1 Litt. St. 611, § 9.) In *Louisiana* neither an heir nor a legatee can be an attesting witness (1825, Code, § 1585; 1870, Id., § 1592,) except to a "mystic" or sealed will (Id., §§ 1586, 1593.) In *Maine* the act of 1821 (P. L. 137, § 8,) provided that a gift to an attesting witness should be void and the witness competent to prove the will; also that a legatee who had been already paid, or had released his claim under the will (§ 10), or had died before testator (§ 11), should be a competent witness, but in

case of release, there could be no subsequent payment or compensation (§ 12.) None of these provisions are found in the subsequent revision of 1871. In *Maryland* the act of 25 Geo. II., c. 6 is contained in Chancellor Kilty's list of British statutes in force in 1809. Its provisions are, however, embodied neither in the code of 1860 nor the wills act of 1798. In *Massachusetts* it was enacted in 1878 (P. L. 87) that a gift by will to the husband or wife of an attesting witness should be void. For earlier statutes of Massachusetts, see opinion of Gray, J., in Sullivan *v.* Sullivan, 106 Mass. 476, *supra.* The general statutes of 1859 (c. 92, § 10,) only prohibit such gift where there are not three other competent witnesses to prove the will. In *Michigan* a legatee who is also an attesting witness may take such share of the estate as would fall to him in case of intestacy (1857, C. L., c. 92, § 4329; 1871, C. L., c. 154, § 8.) A gift to a witness other than the heir, who is necessary to prove the will, is void, and the witness competent (1871, C. L., c. 154, § 7,) except a charge of debt due to the witness. The act of 1809 (2 T. L. 13, §§ 9–14,) provided that all gifts to witnesses except charge of debt in their favor, and except heirs, should be void, and the witnesses competent, and that a creditor might be a competent witness, or another legatee might become so after payment to him, or release or refusal by him of the legacy, or by his death before the testator, or before he had been paid or had released the legacy, such payment or release to bar all subsequent repayment or compensation. The act of 1811 (1 T. L. 160, § 2,) simply provided that gifts to a necessary witness in excess of his intestate share should be void. In *Minnesota* a gift to a witness who is necessary to prove the will, other than a charge of debt in his favor, is void, and the witness competent, and such witness may take any share which he would have been entitled to, not exceeding the provision of the will (1851, R. S., c. 53, §§ 8, 9; 1866, G. S., c. 47, §§ 7, 8.) In *Missouri* a gift to a witness who is necessary for proper probate of the will, except a charge of a debt in his favor, is void, and the witness competent, so if he die before probate; or if payment be made to, or released by, him before probate, in which case there can be no subsequent repayment or compensation (1825, R. L. 790, §§ 13–17; 1835, R. S. 617, §§ 22–27; 1845, R. S. 1078, §§ 38–45, allowing witness to take what he would have been entitled to in case of intestacy; 1855, R. S., c. 167, §§ 37–44; 1865, G. S., c 131, §§ 36–43; 1879, R. S., §§ 3996-4003.) In *Nebraska* a gift to a witness who is necessary to prove the will, except a charge of debt in his favor, is void, and the witness may take what he would have been entitled to in case of intestacy (1855, P. L. 63, §§ 46, 47; 1856, P. L. 95, §§ 15, 16; 1860, P. L. 77, §§ 8, 9; 1866, R. S., c. 14, §§ 130, 131; 1873, G. S., c. 17, §§ 130, 131.) In *Nevada* the provision is the same, except that no allowance as in case of intestacy is made to the witness (1862, P. L., c. 61, § 4.) So in *New Hampshire* (1878, G. L., c. 193, § 8, the act of 1822, P. L. 10, § 10, applying to all witnesses whether necessary or not.) It is also provided that a gift to a corporation shall be valid, notwithstanding that the will be attested by one of its members (1865, P. L. 4089; 1878, G. L., c. 193, § 9.) In *New Jersey* the entire act of 25 Geo. II., c. 6, was enacted in 1795, and still remains on the statute-book (Pat. Rev. 190; 1877, Rev. 1244-5, §§ 4–8.) In *New York* the act of 1787 (1 Greenl. 386) provided as in the act of 25 Geo. II., that a devise to a witness, except only a charge of debt due him, should be void, and the witness competent (§ 6); also that a legatee might become competent as a witness after having refused or released his legacy, or after payment of it (§ 7), which refusal or payment could not be afterwards revoked (§ 8), the statute not being applicable to an heir at law or a devisee in posses-

CREDITOR ATTESTING WITNESS.

XVI. (*d*) And be it further enacted, That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.[17]

Creditor attesting to be admitted a witness.

sion before March, 1753, or established as entitled in a contest over the will (§ 9.) By the Revised Statutes of 1829 (2 R. S. 56, §§ 50, 51,) all gifts to attesting witnesses are void, unless the witness is entitled otherwise than under the will, and the witness is competent. In *North Carolina* a gift to an attesting witness, or the husband or wife of such witness, is void, and the witness competent (1873, Batt. Rev., c. 119, § 10.) In *Ohio* a gift to a witness, who is necessary to prove the will, is void so far as it exceeds any share to which he might have been entitled in case of intestacy, and the witness is competent (1808, 6 L. 64, § 7; 1810, 8 L. 146, § 7; 1816, 14 L. 141, § 7; 1824, 22 L. 119, § 8; 1831, 29 L. 242, § 10; 1840, 38 L. 120, § 12; 1852, 50 L. 297, § 11; 1878, 75 L. 838, § 13; 1880, Rev. § 5925.) So in *Ore-*

(*d*) Vol. I., p *73.

17. This section is in substance the same as 25 Geo. II., c. 6, § 2. It has also been enacted in *Alabama* (Mississippi Territory, 1806, Toulm. Dig. 883, § 10); *Arkansas* (1847. R. S., c. 170, § 42; 1873, R. S., § 5807); *California* (1850, P. L., c. 72, § 5; 1872, Code, § 6282); *Colorado* (1867, R. S., c. 90, § 6; 1877, G. L., § 2793); *District of Columbia* (1857, Rev. Code, c. 52, § 25); *Delaware* (1829, P. L., 221, § 3; 1852, Rev. Code 272, § 4; ed. 1874, p. 508.) In *Georgia* the act of 25 Geo. II., c. 6, is enumerated in Schley's edition of the British statutes in force in that state (p. 384.) This section, however, does not appear in the Georgia code. In *Illinois* a creditor is a competent attesting witness, notwithstanding a charge in the will in his favor (1829, Rev. Code 204, § 38; 1833, P. L. 624; 1845, R. S. 545, § 43; 1872, R. S., c. 148, § 20.) So in *Iowa* (1839, P. L. 484, § 39; 1843, P. L. 667, § 7; 1873, Code, § 2327); *Kansas* (1855, T. L., c. 164, § 39, not re-enacted); *Kentucky* (1851, R. S., c. 106, § 14, including charge of a debt to the witness' husband or wife; 1873, G. S., c. 113, § 14); *Maine* (1821, P. L. 137, § 9, not re-enacted in R. S. 1871.) (For law of *Massachusetts*, see Sullivan *v.* Sullivan, 106 Mass. 474.) *Michigan* (1809, 2 T. L. 13 § 10; 1871, C. L., c. 154, § 7); *Missouri* (1825, R. L. 790, § 14; 1835, R. S. 617, § 24; 1845, R. S. 1078, § 41; 1855, R. S., c. 167, § 40; 1865, G. S., c. 131, § 39; 1879, R. S., § 3998); *Nebraska* (1856, P. L. 94, § 6; 1873, G. S., c. 17, § 130); *New Jersey* (1795, Pat. Rev. 190, § 5; 1877, Rev. 1244, § 5); *New York* (1787, 1 Greenl. 386, § 7; 1829, 2 R. S. 56, § 51); *Ohio* (1840, 38 L. 120, § 11, not re-enacted); *Oregon* (1850, G. S. 274, § 41; 1855, P. L. 384, § 41); *Rhode Island* (1857, R. S. 356, § 14; 1872, G. S., 374, § 14); *South Carolina* (1712, 2 Stats. at Large 401; 1873, R. S. 442, § 6); *Vermont* (1797, Dig. L. 119, § 10; 1851, Comp. S. 327, § 12; 1862, G. S., c. 49, § 12); *Virginia* (1873, Code 913, § 20); *West Virginia* (1863, Code, c. 77, § 20); *Wisconsin* (1838, T. L. 182, § 26.)

EXECUTOR ATTESTING WITNESS.

XVII. (*e*) And be it further enacted, That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.[18]

Executor to be admitted a witness.

gon, and it is further provided that a witness who has released, or has been paid his claim under the will, or has died before payment or release, shall be competent, and such payment or release be a bar to all subsequent compensation (1850, G. S. 274, §§ 38–45; 1855, P. L. 384, §§ 38–45.) In *Rhode Island* a gift to a subscribing witness, other than a creditor in whose favor a charge is made, is void, and the witness is competent, or if witness die before the testator, he is competent (1857, R. S. 356, §§ 13–15; 1872, G. S. 374, §§ 13–15.) In *South Carolina* the act of 1712 (2 Stats. at Large 401) puts in force the English statute of 25 Geo. II., c. 6. This was changed by act of 1858 (12 Stats. 597), so as to extend to husband or wife of witness, and by the Revised Statutes of 1873 (p. 442, §§ 5, 6,) to a provision avoiding such gift to a witness, or the husband, or wife of a witness as to any excess over share in case of intestacy, but making the witness competent; so, too, a creditor whose debt is charged. In *Texas* a gift to a witness necessary to prove the will is void, and the witness competent, and the witness can take any share to which he would be entitled in case of intestacy, not exceeding such gift (1840, P. L. 167, § 10; 1879, R. S., § 4872); but since 1875 such gift is valid if satisfactory proof of the will can be made by some other, who is not a subscribing witness (1875, P. L. 179, § 10; 1879, R. S., § 4873.) In *Vermont* a gift to an attesting witness, other than an heir, is void unless there are three other competent witnesses, and the witness is competent (1797, Dig. L. 119, § 9; 1851, Comp. S. 327, § 11; 1862, G. S., c. 49, § 11.) The act of 1797 also provided, as that of 25 Geo. II., for the case of the gift being paid over or released before probate or the witness dying before the testator (Dig. L. 119, §§ 11–14.) These sections are not in the later act. In *Virginia* a gift to a witness who is necessary to the proper execution of the will (or, since 1873, the wife or husband of a witness,) is void, except such share as the witness (or wife or husband) would take in case of intestacy (1785, 12 Stats. at Large 143, § 9; 1873, Code 913, § 19.) So in *West Virginia*, if the witness is necessary to probate (1868, Code, c. 77, § 18.) In *Wisconsin* a gift to a necessary (since 1849) witness is void, except only a charge of debt in his favor, and the witness competent (1838, T. L. 182, § 25; 1849, R. S. 353, § 8; 1878, R. S., § 2284.) By the earliest of said acts provision was made, as in 25 Geo. II., c. 6, for competency in case of payment, release or death of witness (§§ 27–29.) The witness may, however, take such share as he would have in case of intestacy (1849, R. S. 353, § 9; 1878, R. S., § 2285.)

(*e*) Vol. I., pp. *73, *74.

18. This clause has been enacted in the *District of Columbia* (1857, Rev. Code, c. 52, § 26.) Also in *Kentucky* (1851, R. S., c. 106, § 15; 1873, G. S., c. 113, § 15.) And *North Carolina* (1873, Batt. Rev., c. 119, § 9.) In *South Carolina* where a witness is appointed executor, a gift to him in excess of legal commissions is void (1873, R. S. 442, § 5.) In *Virginia* (1873, Code 913, § 21,) an executor is a competent witness. So in *West Virginia* (1868, Code, c. 77, § 20.)

REVOCATION BY MARRIAGE.

XVIII. (*f*) And be it further enacted, That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions.)[19]

Will to be revoked by marriage.

(*f*) Vol. I., p. *128; vol. II., p. *237.

19. For an account of the common law history of revocation by subsequent marriage and birth of issue, see the opinion of Chancellor Kent in Brush *v.* Wilkins, 4 Johns. Ch. 510, *et seq.* See also vol. I., pp. 268, 270, n., 271, n.

Independent of the statute of Victoria and before it, the *marriage alone* of a testatrix worked a revocation of her will. This was held as early as 1589, in Forse & Hembling's Case, 4 Rep. 61. Not so, however, the marriage alone of a man, Wellington *v.* Wellington, 4 Burr. 2171, (A. D. 1768.) In the absence of statute, this rule of the common law may be considered to be abrogated in those states which give a married woman unrestricted testamentary powers. As to such enabling acts, see note 8, *supra.* By statute in the United States marriage alone revokes the will *of an unmarried woman* in Alabama, Arkansas, California, Indiana, Missouri, Nevada, New York, Oregon, Pennsylvania, and formerly in Kansas and Nebraska; but the contrary is provided in Ohio.

In Connecticut the marriage alone *of any testator* revokes his will. This is also the case in Georgia, Illinois, Kentucky, Nevada (if wife survive), North Carolina, Rhode Island, Virginia and West Virginia; and formerly in Delaware.

By the civil law *subsequent marriage and the birth of issue* accomplished the revocation of any will. This rule was finally adopted by the common law in 1771 (see vol. I., p. 276,) and was extended in 1793 (Doe *v.* Lancashire, 5 T. R. 49,) so as to include the birth of a posthumous child. It applies only where wife and issue were wholly unprovided for, and the whole of testator's estate was disposed of by the will; in such case, however, notwithstanding the subsequent death of the child before the testator. "Different views have been entertained of the principle on which this species of revocation rested. On the one hand it was considered that the revocation was grounded on the implied intention of the testator to revoke his will under the new state of circumstances which had taken place since the will was made, and upon such implied intention only, and although, perhaps no direct assertion to this effect can be attributed to any of the ecclesiastical judges (Sir H. Jenner Fust in Fox *v.* Marston, 1 Curt. 498,) it is difficult, if not impracticable to draw any other conclusions from the numerous decisions of the prerogative court connected with this subject, than that the revocation was to be regarded as grounded on an *intention* to be implied from the new state of circumstances, and new moral testamentary duties which had taken place since the will was made (4 Kent 523; 1 Phillim. 473; 1 Hagg. 711.) On the other hand, it was contended that the revocation was a consequence of a rule of law, or of a condition tacitly annexed by law to the execution of a will, that when the state of circumstances under which the will was made became entirely

altered by a subsequent marriage and the birth of a child, the will should become void; and that the operation of this rule of law was altogether independent of any intention on the part of the testator. And of this opinion were all the judges of England assembled in the exchequer chamber, *absente* Lord Denman, in the great case of Marston *v.* Roe dem. Fox (8 Ad. & El. 14; S. C., 2 Nev. & P. 504,) where it was solemnly decided that the revocation of the will took place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself. It follows, as an obvious consequence of this conflict of doctrine between the courts of ecclesiastical and common law jurisdiction that in the former courts, in order to rebut the presumption of an intention to revoke, it has always been held that any evidence is admissible in support of the will, which shows a contrary intention; so that, not only the evidence of circumstances has been received for this purpose, but also parol evidence of the testator's declarations in favor of his will (1 Phillim. 469; Gibbons *v.* Cross, 2 Add. 455; Fox *v.* Marston, 1 Curt. 494; Tapster *v.* Holtzappfelt, 5 Notes of Cas. 554.) Whereas in the temporal courts it was finally settled that no evidence of the testator's intention that his will should not be revoked, was admissible to rebut the presumption of law that such revocation should take place (Marston *v.* Roe dem. Fox, 8 Ad. & El. 14; S. C., 2 Nev. & P. 504.)" Wms. Ex'rs (6th Am. ed.) 231. Mr. Williams, however, adds that the rule of this last case is now extending to the ecclesiastical courts.

Marriage and birth of issue is a revocation by statute in Missouri, if the child survive the testator. So in Oregon; and if either wife or child survive the testator in Alabama, Arkansas, California, Nebraska, (formerly), New York, Pennsylvania and South Carolina. And all evidence to rebut this presumption is excluded by statute in Alabama, Arkansas, California, Kansas, Ohio and Oregon; but permitted by statute of Kentucky. The statute of some states provides that there shall be no revocation by implication from change of circumstance, (see note 20, *infra*); or provides it by implication by enacting that there shall be no revocation except by execution of a new will or destruction of the old one, (see note 21, *infra*.)

Birth of issue alone does not revoke a will at common law, although this is now so by statute in Connecticut, Delaware, Georgia and Louisiana, and was so in Illinois prior to 1845; in Indiana prior to 1852; in Missouri until 1825; and in Virginia. In other states such child takes a share as in case of intestacy, made up by contribution. This is so in Alabama, Arkansas, California, Colorado, Delaware, District of Columbia, Illinois, Iowa, (until restricted in 1873 to posthumous children), Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, West Virginia and Wisconsin; and unless the child die before actual payment of the share, in Alabama; or before the testator's death and leave no issue, in Indiana; or under age, unmarried and without issue, in Virginia (with reversion on death under age) and West Virginia.

As to after-born children, a distinction is sometimes made between the case where testator has other children at the time of making his will and the case where he has none, *e. g.*, District of Columbia, Delaware, (formerly), Kansas, Kentucky, Michigan, (formerly), Mississippi, New Jersey, Ohio, Texas, Virginia (formerly) and West Virginia. In such latter case the will has no effect during the child's life, and is void unless he die unmarried and under age, in the District of Columbia and Texas; or unmarried, under age and without issue, in Kentucky,

Michigan (formerly) and Mississippi; or is revoked absolutely in Kansas, New Jersey and Ohio; while such will is revoked, unless he die unmarried and under age, in Florida. In the former case the after-born child takes a share as in case of intestacy, in Florida, Kansas, Kentucky, (with reversion on death under age, unmarried and without issue,) Mississippi, New Jersey, Ohio and West Virginia; and if he be dead, his issue take in like manner in West Virginia.

Omission of a child was formerly a revocation *pro tanto* in Arkansas and Missouri. In Kentucky such omission is absolutely a revocation if there be no other child living at the time of making the will, unless the omitted child die under age, unmarried and without issue; and in West Virginia, unless the child die unmarried and without issue. In some states an omitted child takes a share as in case of intestacy, unless a contrary intention appears. This is so in California, Kansas, (if absent or reputed dead), Michigan, Minnesota, Missouri, Nevada, New Hampshire, Oregon, Vermont and Virginia, and was so in Iowa until 1873. So now in Kentucky a child or grandchild believed to be dead. And this applies to the issue of a deceased child, omitted in California, Kansas and Missouri, and is confined to posthumous children in Massachusetts. In some states an omitted child takes a share as in case of intestacy, if no intention to omit him appear in the will as above. But others require the mistake to be apparent on the will, *e. g.*, Minnesota, Nebraska and Wisconsin. In the District of Columbia an exception is made to this rule, if the omitted child die unmarried, under age and without issue.

For these and other matters the statutes in question are more particularly set out as follows:

In *Alabama* a will is revoked by marriage of testator and birth of issue (whether born before or after testator's death), if either wife or issue survive the testator, unless provision is made for them, or an intention not to make such provision is expressed, and no evidence can be received to rebut the presumption of revocation (1852, Code, § 1597; 1876, Id., § 2282); and marriage alone revokes the will of an unmarried woman (1852, Code, § 1598; 1876, Id., § 2283.) And a child born after the making of a will and not mentioned in it takes a share of the estate as in case of intestacy, unless it die before receiving the same (1852, Code, §§ 1599, 1601; 1876, Id., §§ 2284, 2286; see, too, 1806, Toulm. Dig. 883, § 7, giving such share to a posthumous child.)

In *Arkansas* a will is revoked by marriage and birth of issue, or marriage alone, as in Alabama, *supra*, (1847, R. S., c. 170, §§ 7, 8; 1873, R. S., §§ 5766, 5767,) with the same provision as to conclusiveness of presumption. Prior to the revision of 1838 a will was revoked *pro tanto* by the omission of a child or by marriage alone, or birth of issue alone (whether posthumous or not), such wife, husband or issue taking a share as in case of intestacy (1815, Comp. T. L. 556, § 4.) So now an after-born child, or a child or the representative of a deceased child omitted in the will, takes a share as in case of intestacy (1847, R. S., c. 170, §§ 11, 12; 1873, R. S., §§ 5770, 5771.)

In *California* a will is revoked by testator's marriage, if the wife survives him and be neither provided for nor expressly excluded by the will, and no evidence is admissible to rebut such presumption of revocation; so by marriage and birth of issue, if either wife or issue survive testator, and be not provided for by the will; so by marriage alone of an unmarried testatrix, in which case the husband's death does not revive the will (1850, P. L. 178, c. 72, §§ 11–13; 1872, Code, §§ 6298–6300.) By the same acts it is further provided that an after-born child not provided for in the will, or a child or the issue of a deceased child omitted in

the will without apparent intention, shall take a share of testator's estate as in case of intestacy, unless such share have been already received by way of advancement (§§ 16–19; §§ 6306–6309.)

In *Colorado* the only provision to similar effect is that an after-born child omitted in the will, without apparent intention to disinherit him, shall take a share as in case of intestacy (1861, P. L. 403, § 14; 1867, R. S., c. 90, § 7; 1877, G. L., § 2795.)

In the *District of Columbia* the code of 1816 (p. 78, §§ 76, 77, 79,) provided that there should be no revocation of a devise except by cancellation or writing executed like a will, but that if testator should at the time have had no child, and made no provision for any, such will should have no effect during the child's life and be absolutely void, unless the child die unmarried before the age of twenty-one years. This was copied from the Virginia statute of 1785, together with the provision that an after-born or a posthumous child omitted in the will should take a share as in case of intestacy. These sections are virtually re-enacted in 1857 (Rev. Code, c. 52, §§ 12–15,) with the additional provisions excepting the case of an omitted child living at the time the will was made, but dying unmarried, under the age of twenty-one and without issue (§ 14), and in case of an after-born child, providing for a reversion of the property in case of his death under the age of twenty-one, unmarried and without issue (§ 15.) Section XVIII. of the statute of Victoria is also contained in the revised code of 1857 (§ 13.)

In *Connecticut* the subsequent birth of a child is a revocation of a will (1821, Rev. 209, § 5; 1849, R. S. 345, § 5; 1854, Stats. 483, § 5; 1866, G. S. 401, § 5; 1875, G. S. 368, § 1.) Likewise, since 1875, subsequent marriage of the testator (1875, P. L. 48.)

In *Delaware* by the act of 1766 (1 St. L. 419), a will was revoked by marriage or birth of issue. This is still the law as to the latter provision (1852, Rev. Code 272, § 11; ed. 1874, p. 508.) By the act of 1827 (P. L. 118), this was only so where there was no child at the time the will was made. A child born, or a wife married, after the making of the will, takes a share as in case of intestacy (1827, P. L. 118; 1852, Rev. Code 272, §§ 12, 23; ed. 1874, p. 508, §§ 1654, 1665.)

In *Florida* it was provided by the act of 1822 (P. L. 52, § 4,) that the subsequent birth of a child, there being no child living when the will was made, worked a revocation, unless he died unmarried under the age of twenty-one. If there were other children, the after-born child takes a share as in case of intestacy.

In *Georgia* subsequent marriage of the testator or birth of issue effects a revocation (1834, P. L. 88; 1850, Code, § 2441; 1873, Id., § 2477.)

In *Illinois* an after-born child, although since 1845 such birth is not a revocation if not provided for by the will, takes a share as in case of intestacy, unless there is a clear intention to disinherit him (1829, Rev. Code 176, § 12; 1833, P. L. 615, 627; 1845, R. S. 539, § 12; 1872, R. S., c. 39, § 10.) The subsequent marriage of the testator revokes his will (1872, R. S., c. 39, § 10.)

In *Indiana* the will of an unmarried testatrix is revoked by her subsequent marriage, (1852, R. S. 311, § 5; 1876, R. S. 572, § 5.) And formerly a will was revoked by the subsequent birth of a child, omitted in the will (1831, P. L. 274, § 20; 1838, R. S. 316, § 20; 1852, R. S. 311, § 3); but now an exception is made if the after-born child die before the testor, and neither child nor testator leave a widow; but if the child's widow be living at testator's death, she will take her husband's share until her marriage (1852, R. S. 308, § 4; 1876, R. S. 572, § 4.)

In *Iowa* the act of 1839 (T. L. 479, § 13,) provided that the subsequent birth of a child not provided for in the will

should be *no revocation* of a will, but the child should take a share as in case of intestacy. In 1843 (P. L. 670, §§ 19, 20,) this was changed by omitting the clause as to revocation, and extending the provision to any child or the issue of a deceased child omitted without apparent intention, and by the code of 1873 (§ 2334) such share is only provided for a posthumous child.

In *Kansas* the will of an unmarried testatrix was revoked by her subsequent marriage (1855, T. L., c. 164, § 7; 1865, P. L., c. 86, § 37); for this is now substituted a prohibition against willing more than half one's property away from husband or wife (1868, G. S., c. 117, § 35; ed. 1878, § 6147.) Formerly marriage of testator and birth of issue, although posthumous, revoked a will if either wife or issue were left unprovided for by the will and survived the testator (1855, T. L., c. 164, § 6,) and no evidence was admissible to rebut the presumption of revocation. This is now confined to the case of after-born issue, where there were none living at the date of the will (1865, P. L., c. 86, § 38; 1868, G. S., c. 117, § 36; ed. 1878, § 6148.) In 1859 and 1862 a provision was made giving an omitted posthumous child a share as in case of intestacy (1859, P. L., c. 131, § 8; 1862, Comp. L., c. 215, § 8.) By the act of 1855, an omitted child (since 1865, absent or reputed to be dead, unless provision has been made for his child, which in that case falls to him,) or the descendant of an omitted deceased child, takes a share as in case of intestacy (1855, T. L., c. 164, § 10; 1865, P. L., c. 86, § 41; 1868, G. S., c. 117, § 39; ed. 1878, § 6151,) effecting thereby a revocation *pro tanto*. If there is no child at the making of the will, the after-birth of a child revokes it, if there is no provision for the child in the will; and evidence is not admitted to rebut the presumption of intent; but if there are other children, such after-born child only takes a share as in case of intestacy (1865, P. L., c. 86, §§ 38, 41; 1868, G. S., c. 117, §§ 36, 39.)

In *Kentucky* a will is revoked by testator's marriage, with the same exception as in section XVIII. of the statute of Victoria (1851, R. S., c. 106, § 9; 1873, G. S., c. 113, § 9.) In case of the omission of a child then living or posthumous, if there be no other child living at the time of making the will, the will is to be construed to take effect, if such child die under the age of twenty-one, unmarried and without issue; but if there be another child or children then living and provided for, the omitted after-born child takes a share of the estate as in case of intestacy, subject to go to the donee named in the will, if such after-born chid die under the age of twenty-one, unmarried and without issue (1851, R. S., c. 106, §§ 24, 25; 1873, G. S., c. 113, §§ 24, 25.) This provision dates back from 1785 (1 Litt. Stats, 611, § 3,) and extends also to a child or grandchild living at the testator's death, but believed by him to be dead, or a child dying out of the state leaving issue of which testator had no knowledge, but the presumption of mistake in omission of such child or issue may be rebutted (1851, R. S., c. 106, § 19; 1873, G. S., c. 113, § 19.)

In *Louisiana* the subsequent birth of a legitimate child revokes a will (1825, Code, § 1698; ed. 1870, § 1705.)

In *Maine* an after-born or an omitted child takes a share as in case of intestacy (1821, P. L. 137, §§ 14, 15; 1871, R. S., 563, §§ 8, 9.)

In *Massachusetts* an omitted or posthumous child takes a share of the estate as in case of intestacy (1700, Acts, &c., of Mass. Bay, vol. I., p. 429; 1784, 1 Laws 109, §§ 7, 8; 1859, G. S., c. 92, §§ 25, 26,) unless a contrary intention appears.

In *Michigan* a child, or the issue of a deceased child, omitted without apparent intention, takes a share of the estate as in case of intestacy (1857, Comp. L., § 4347; 1871, Comp. L., c. 154, § 26.) So an after-

born child (1809, 2 T. L. 13, § 6; 1811, 1 T. L. 160, § 2; 1871, Comp. L. 1375, § 25.) By the act of 1811, (*supra*), not now in force, if there were no child living at the making of the will and one were afterward born and living at testator's death, or posthumous, and omitted in the will, the will was void, if he lived to the age of twenty-one, or married or had issue.

In *Minnesota* an after-born child takes a share of the estate as in case of intestacy, unless a contrary intention appear; so an omitted child, if it appear that the omission was made by mistake (1851, R. S., c. 53, §§ 26, 27; 1866, G. S., c. 47, §§ 22, 23.)

In *Mississippi* an omitted after-born child takes a share as in case of intestacy (1821, Hutch. Code 647, § 16; 1871, Rev. Code, § 2390); and if there were no child living when the will was made, and no after-born or posthumous child provided for, such child takes a share as in case of intestacy, and the will is void, unless the child die under the age of twenty-one, unmarried and without issue (1821, Hutch. Code 647, § 15; Rev. Code 1871, § 2389.)

In *Missouri*, after a will disposing of the testator's whole estate, his marriage and the birth of issue living at his death or of a posthumous child, if no provision is made in his will for such issue or child, is a revocation of the will and no evidence is admissible to rebut the presumption of such intent, and the marriage alone of an unmarried testatrix is a revocation of her will (1845, R. S. 1078, §§ 7, 8; 1855, R. S., c. 167, §§ 6, 7; 1865, G. S., c. 131, §§ 5, 6; 1879, R. S., §§ 3964–5.) A child, or, since 1835, the descendant of a deceased child, although posthumous, omitted in the will, takes a share of the estate as in case of intestacy, but since 1825, this is only the case where there have not been made already to such person advancements equal to such share (1808, 1 T. L. 141, § 22; 1814, Id. 405, § 28; 1821, Id 786, § 4; 1825, R. L. 790, § 20; 1835, R. S. 617 § 30; 1845, R. S. 1078, §§ 11, 12; 1855, R. S., c. 167, §§ 10, 11; 1865, G. S., c. 131, §§ 9, 10; 1879, R. S., §§ 3969–70.) Prior to 1825, if a testator omitted a child in his will, or subsequently married, or had a child and died leaving either widow or child surviving and unprovided for by will, the will was thereby revoked *pro tanto*, and the widow or child took a share of the estate as in case of intestacy (1808, 1 T. L. 141, § 22; 1814, Id. 405, § 28; 1821, Id. 786, § 4.)

In *Nebraska* from 1856 to 1860 the testator's marriage subsequent to a will disposing of his whole estate and the birth of issue and the survival of either wife or issue, was a revocation of the will, as also the mere marriage of an unmarried testatrix, (1856, P. L. 95, §§ 20, 21,) but since 1860 (P. L. 77, § 10,) there can be no revocation except by cancellation or subsequent will, or a change of circumstances from which such intention must be implied. A posthumous child, and since 1856 any after-born child, whether posthumous or not, omitted in the will takes a share as in case of intestacy, unless since 1860 a contrary intention appear (1855, P. L. 63, § 48; 1856, P. L. 99, § 49; 1860, P. L., c. 5, § 26; 1866, R. S., c. 14, § 148; 1873, G. S., c. 17, § 148.) So, too, since 1860, any child omitted in the will, if such omission appear to be by mistake (Id., § 27; 1866 and 1873, Id., § 149.)

In *Nevada* the testator's subsequent marriage is a revocation of his will, if the wife survive, unless she is either expressly provided for or excluded in the will, and no evidence is admissible to rebut the presumption of intent to revoke in such case (1862, P. L., c. 61, § 10.) So the marriage of an unmarried testatrix; and in this case her subsequent death does not revive the will (Id., § 11.) An after-born child not provided for, or any omitted child, unless a contrary intention appear, takes a share as in case of intestacy (Id., §§ 14, 15.)

In *New Hampshire* an after-born or omitted child takes a share as in case of

intestacy (1822, P. L. 10, § 3; 1878, G. L., c. 193, § 10.)

In *New Jersey*, if the testator have no issue at the time of making his will, the subsequent birth of a child surviving him is a revocation of the will; but if he already have child or children, the subsequent birth of a child is no revocation, but such after-born child takes a share as in case of intestacy (1824, P. L. 174, §§ 1, 2; 1877, Rev. 1246, §§ 18, 19.)

In *New York* the marriage of the testator, after making a will disposing of all his property, and the birth of issue, if either wife or issue survive the testator, and the will contain no words showing a contrary intention, is a revocation of the will, and so is the mere marriage of an unmarried testatrix (1829, 2 R. S. 56, §§ 43, 44.) An after-born child, not provided for in the will, takes a share as in case of intestacy (Id., § 49.)

In *North Carolina* marriage is a revocation as in section XIX., and with like exception (1845, P. L. 125, § 10; 1873, Batt. Rev., c. 119, § 42.) Provision was also made at an early day for giving a share as in case of intestacy to an after-born child (1808, P. L., c. 740; 1873, Batt. Rev., c. 45, § 112); and a petition therefor was made a lien from the time of its being filed on testator's real estate (1823, P. L., c. 1183; 1873, Batt. Rev., c. 45, §§ 159–164.)

In *Ohio* since 1840, a will is not revoked by the subsequent marriage of an unmarried testatrix, but is revoked by the subsequent birth of a child, although posthumous, if there was no child at the time the will was made (1840, 38 L. 120, §§ 39, 40; 1852, 50 L. 297, §§ 37, 38, no evidence being admissible to rebut the presumed intent to revoke; 1878, 75 L. 838, §§ 46, 47; 1880, Rev., §§ 5958–9.) A child absent or "reputed," not "reported," dead, or a child born after the making of the will, there being another child living at the date of the will, takes a share as in case of intestacy, and it was provided until 1824 that a testator might expressly disinherit any child (1808, 6 L. 64, § 4; 1810, 8 L. 146, § 4; 1816, 14 L., § 4; 1824, 22 L. 116, § 6; 1831, 29 L. 242, § 6; 1840, 38 L. 120, § 43; 1852, 50 L. 297, § 41; 1878, 75 L. 838, § 49; 1880, Rev., § 5961.) Prior to 1840 the birth of a child subsequent to the making of the will, if there was none before, effected a revocation of the will (1808, 6 L. 64, § 3; 1816, 14 L. 141, § 3; 1824, 22 L. 119, § 5; 1831, 29 L. 242, § 5.)

In *Oregon* the subsequent marriage of an unmarried testatrix revokes her will (1850, G. S. 274, § 8; 1855, P. L. 384, § 8.) So after a will disposing of testator's whole estate, his marriage and the birth of issue who survive the testator, and are not provided for in the will; and no evidence is admissible to rebut such presumption (Id., § 7.) An omitted child or descendant of a deceased child, not provided for by the will nor by way of advancement, takes a share as in case of intestacy (Id., §§ 11, 12.)

In *Pennsylvania* the subsequent marriage of an unmarried testatrix revokes her will, and it is not revived by the death of her husband (1833, P. L. 249, § 16; Purd. Dig. 1872, p. 1474, § 19.) And in general subsequent marriage or birth of a child revokes a will as to the widow or child surviving testator, and such widow or child takes a share as in case of intestacy (1833, P. L. 249, § 15; Purd. Dig., *supra*, § 18.)

In *Rhode Island* marriage revokes a will (1857, R. S. 356, § 5; 1872, G. S. 374.) An after-born child takes a share as in case of intestacy (Id., § 10.)

In *South Carolina* subsequent marriage and birth of issue, if wife or child survive testator, revokes a will, unless expressly made in contemplation of marriage and with provision for wife or issue (1789, 5 Stats. at Large 106, § 10; 1873, R. S. 442, § 8.) An after-born child, though posthumous, takes a share as in case of intestacy (1789, *supra*, § 8; 1873, *supra*, §§ 11, 12.)

In *Tennessee* an after-born child, for

REVOCATION BY PRESUMPTION.

No will to be revoked by presumption.

XIX. (*g*) And be it further enacted, That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.[20]

whom no provision is made in the will, takes a share of the estate as in case of intestacy (1823, P. L. 31; 1858, Code, § 2193; 1871, Comp. St., § 2193.)

In *Texas* if at the making of the will there are no children, the birth of a child who survives the testator renders the will ineffectual during his life, and void unless he die unmarried and under the age of twenty-one, and in all cases the after-born child, if not provided for, takes a share of the estate as in case of intestacy (1840, P. L. 167, §§ 3, 4; 1879, R. S., §§ 4867–9.)

In *Vermont* an after-born child, or since 1851, an omitted child takes a share as in case of intestacy (1797, Dig. L. 119, § 6; 1851, Comp. S. 327, §§ 25, 26; 1862, G. S., c. 49, §§ 25, 26.)

In *Virginia*, section XVIII. of the act of Victoria, is in force (Rev. Code, 1819, p. 376; ed. 1873, p. 910, § 7.) It is further enacted that an after-born or other child omitted in the will, shall take as though the will were made on condition of its dying under the age of twenty-one, unmarried and without issue (1873, Code 912, §§ 17, 18,) but the share so given to an after-born child reverts to the testator's estate if the child die under twenty-one. The statute of 1785 (12 Stats. at Large, c. 61, § 3; 1792, 1 Id., N. S., 88, § 3,) made the subsequent birth of a child a revocation of the will, if there were no other children living at the making of the will, and if the after-born child attained the age of twenty-one; and for the life of the after-born child, if there were other children when the will was made. It also gave a share as in case of intestacy to posthumous children omitted in the will, (Id.), and this was extended in 1840 (P. L. 49) to all omitted children.

In *West Virginia* a will is to be construed, in case of omission of a child or birth of a posthumous child, as if to take effect if such child die unmarried and without issue (1868, Code, c. 77, § 16.) If there be other children living at the time the will was made, an after-born child, or the descendant of a deceased after-born child, not provided for by the will, takes a share as in case of intestacy, to revert if the child die under the age of twenty-one, unmarried and without issue (Id., § 17.) Section XVIII., *supra*, is also enacted here (1868, Code, c. 77, § 6.)

In *Wisconsin* an after-born child omitted takes a share as in case of intestacy, unless a contrary intention appear in the will (1849, R. S., c. 66, § 26; 1878, R. S., § 2286,) and any omitted child takes such share if the omission appear to have been by mistake (1849, R. S., § 27; 1878, R. S., § 2287.)

(*g*) Vol. I., p. *128.

20. See note to section XX., *infra*, for similar provision in Alabama, Arkansas, California, Colorado, District of Columbia, Connecticut, Maryland, Mississippi and New Jersey. So in *California*, by the code of 1872, (§ 6292.) The act of 1850 (P. L. 178, c. 72, § 10,) had made provision for revocation by change of circumstances. In *Delaware* revocation may be implied from change of circumstances (1829, Code 221, § 3; 1852, Rev Code 272, § 10; 1874, ed. 508, § 1652.) But not in *Illinois* (1872, R. S., c. 148, § 17; 1845, R. S. 539, § 15.) Nor in *Indiana* (1876, Rev. 576, § 19.) In *Iowa* the act of 1843 (P. L. 668, § 9,) provided that "nothing shall prevent implied revocation from change of circumstances," but this is omitted in the code of 1873, which

*REVOCATION BY SUBSEQUENT WILL OR CODICIL, OR BY DESTRUCTION OF INSTRUMENT.

XX. And be it further enacted, That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, (*h*) or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, (*i*) or by the

No will to be revoked but by another will or codicil, or writing, or by destruction.

repeals all public and general acts of prior date, "the subjects whereof are revised by this act," (p. 9, c. 4, § 47.) In *Kansas* revocation may be implied from change of circumstances (1865, P. L., c. 86, § 39; 1868, G. S., c. 117, § 37; ed. 1878, § 6149.) In *Kentucky* there can be no revocation of a will except as provided by the statute, which makes no provision for any such result from change of circumstances (1851, R. S., c. 106, § 10; 1873, G. S., c. 113, § 10.) So in *Louisiana* (1825, Code, § 1685; ed. 1870, § 1692.) In *Maine* a will may be revoked by change of circumstances (1871, R. S. 563, § 3.) In *Maryland* as in Kentucky (1798, P. L., c. 101, sub. c. 1, § 4; 1860, Code, art. 93, § 302; 1878, Rev. Code 419, § 5.) In *Massachusetts* as in Maine (1859, G. S., c. 92, § 11); and *Michigan* (1857, Comp. L., § 4330; 1871, Comp. L., c. 154, § 9); and *Minnesota* (1851, R. S., c. 53, § 10; 1866, G. S., c. 47, § 9.) In *Mississippi* as in Kentucky (1821, Hutch. Code 647, § 15; 1871, Rev. Code, § 2389.) In *Missouri* as in Maine (1808, 1 T. L. 141, § 21; 1814, Id. 405, § 27; 1821, Id. 786, § 3; 1825, R. L. 790, § 3; 1835, R. S. 617, § 5; 1845, R. S. 1078, § 6; 1855, R. S., c. 167, § 5; 1865, G. S., c. 131, § 4; 1879, R. S., § 3963.) In *Nebraska* there may be revocation by a change of circumstances from which such intent must be implied (1860, P. L. 77, § 10; 1866, R. S., c. 14, § 132; 1873, G. S., c. 17, § 132.) So in *Nevada* (1862, P. L., c. 61, § 8.) So in *New Hampshire* (1822, P. L. 10, § 7 1878, G. L., c. 193, § 15.) In *New Jersey* only as in section XX. (1795, Pat. Rev. 190, § 2; 1877, Rev. 1243, § 2.) And likewise in *New York* (1787, 1 Greenl. 387, § 3; 1829, 2 R. S. 64; 6th ed., vol. III., p. 63, § 40.) In *North Carolina* no revocation may be presumed from change of circumstances (1873, Batt. Rev., c. 119, § 43; Rev. Code, c. 119, § 24; 1845, P. L. 125, § 11.) In *Ohio* a will may be revoked by change of circumstances (1840, 38 L. 120, § 41; 1852, 50 L. 297, § 39; 1878, 75 L. 838, § 41; 1880, Rev., § 5953.) In *Oregon* not (1850, G. S. 274, § 6; 1855, P. L. 384, § 6.) Nor in *Pennsylvania* (1833, P. L. 249, § 13; Purd. Dig. 1872, p. 1474, § 16.) Nor in *Rhode Island* (1857, R. S. 356, § 5; 1872, G. S. 374, § 6.) In *South Carolina* a devise of land can only be revoked by subsequent will or cancellation (as in note 21, *infra*,) or by marriage (see note 19, *supra*.) In *Tennessee*, where there is no statute, except a provision for revocation of wills of personal property by parol, afterwards reduced to writing and approved as in the statute of frauds (1871, Comp. S., § 2167,) wills may be revoked by cancellation, Smiley *v.* Gambrille, 3 Head 164; or, it seems, even a direction to destroy, Ford *v.* Ford, 7 Humph. 92; and see note 24, *infra*. In *Texas* a will can only be revoked as in section XX. (1840, P. L. 167, § 3; 1879, R. S., § 4861.) So in *Vermont*, "except by implication of law" (1862, G.

(*h*) Vol. I., p. *170.

(*i*) Id.

burning, tearing, or otherwise destroying the same, (*k*) by the testator, or by some person in his presence and by his direction, with the intention (*l*) of revoking the same.[21]

S., c. 49, § 7.) In *Virginia* wills can only be revoked by a writing declaring such intention, and executed like a will (as in note 21), or by cancellation as in section XX., or marriage or birth of issue (as in note 19.) So in *West Virginia* (1868, Code, c. 77, §§ 6, 7.) In *Wisconsin* a will may be revoked by change of circumstances (1849, R. S., c, 66, § 10; 1878, R. S., § 2290.) The only changes of circumstance, which, at common law, wrought a revocation of one's will, were those in his family, as marriage or birth of children, and those in his estate, by conveyance, mortgage, &c. The former of these changes is considered more fully in note 19, *supra*; the latter in note 21, *infra*.

(*k*) Vol. I, p. *140.

(*l*) Vol. I., p. *142.

21. This section differs from the sixth section of the statute of frauds in being made applicable to all wills, whereas the act of 29 Car. II., applied only to devises of real property. In this respect the American statutes follow that of Victoria except that the provision of the statute of frauds for revoking wills of personal property by words reduced to writing and approved by testator in the presence of witnesses is still retained in Florida, Maryland, New Jersey and Tennessee. Before the act of 29 Car. II. all wills might be revoked by parol. The act of cancellation or destruction done by another for the testator must be proved by two witnesses in Alabama and Arkansas, and formerly in Nebraska, and all cancellation must be so proved in California and Iowa. In all cases of revocation both an *intention* to revoke and a revoking *act* are requisite. Neither intention or act is alone sufficient. Thus a later will, insufficiently executed or attested, although the intention be plain, is not sufficient as an act to effect a revocation, Onions *v.* Tyrer, 1 P. Wms. 343, (1716); Jackson *v.* Holloway, 7 Johns. 394, (1811.) Neither is a mere direction to destroy the will sufficient (vol. I., p. 288, n.); nor testator's statement that it had been destroyed, Boylan *v.* Meeker, 4 Dutch. 274, (1860); nor by announcement of an intention to adopt the earlier of two wills, or to make a new disposition in future, nor by endorsement of such intention (vol. I., pp. 334–337.) An involuntary act of destruction, however complete, effects no revocation in the absence of an *animus revocandi*; but as to an intentional act, founded on a mistake on testator's part, authorities have differed, those of the United States generally holding such revocation to be an effectual one (vol. I., p. 351, *et seq.*) Where the intention is clear the act of cancellation need not be an utter destruction of the will, and even an endorsement "canceled" has been held sufficient, Warner *v.* Warner, 37 Vt. 356, (1864); or such endorsement with lines drawn through the will, Evans' Appeal, 58 Penna. St. 238 (1868); but merely writing "obsolete" opposite to a clause was held insufficient in Lewis *v.* Lewis, 2 Watts & S. 455.

In *Alabama* it was required as early as 1806 (Toulm. Dig. 883, § 6,) that a revoking will must be in writing, and now, by the code (1852, § 1613; 1876, § 2296,) revocation must be made as in section XX. of the act of 1 Vict., c. 26, the revoking will to be executed as other wills in Alabama, and the act of cancellation, if performed by another for the testator, to be proved by two witnesses. In *Arkansas* there can be no revocation of a written will except by other will in writing, executed according to Arkansas laws, or by burning, tearing or other destruction, as

OBLITERATIONS AND INTERLINEATIONS.

XXI. (*m*) And be it further enacted, That no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except

No alteration except in certain cases, in

in the statute of Victoria, to be proved by two witnesses, if performed for testator by another (1815, Comp. T. L. 556, § 3; 1847, R. S., c. 170, § 6; 1873, R. S., § 5765.) In *California* revocation can only be by will executed under California laws, or by cancellation as above, and this since 1872 must be proved by two competent witnesses (1850, P. L. 178, c. 72, § 10; 1872, Code, §§ 6292-3.) But a later will is no revocation of an earlier will, unless it be inconsistent with it (1872, Code, § 6296.) In *Colorado* there can be no verbal revocation of a will but only by cancellation or writing executed like a will (1861, P. L. 403, § 16; 1867, R. S., c. 90, § 4; 1877, G. L., § 2791.) So in the *District of Columbia* (1816, Code, p. 78, § 76; 1857, Rev. Code, c. 52, § 12.) So in *Connecticut* (1821, Rev. 209, § 6; 1854, Stats. 483, § 6; 1866, G. S. 401, § 6; 1875, G. S. 368, § 5.) In *Delaware* a will may be revoked by cancellation or writing executed like a will, as in section XX. (1753, 1 St. L. 342, § 2; 1852, Rev. Code 272, § 10; ed. 1874, p. 508, § 1652.) So in *Florida* (1822, P. L. 52, § 3; 1823, P. L. 101, § 2; 1828, P. L. 141, § 52); but a will of personal property may be revoked by parol if reduced to writing and read to, and approved by, the testator, and proved by three witnesses (1872, Bush Dig. 76, § 6.) In *Georgia*, as in Delaware (1858, Code, §§ 2436-7; 1873, Id., §§ 2472-3.) So in *Illinois* (1829, Code 196, § 14; 1833, P. L. 616; 1845, R. S. 539, § 15; 1872, R. S., c. 148, § 17,) the act prohibiting all "verbal" revocation of written wills. In *Indiana* a written will of personal property might formerly be revoked by parol, if such revocation were reduced to writing before testator's death and approved by him, and proved by two witnesses (1824, R. L., c. 45, § 16; 1831, P L. 274, § 19; 1838, Rev. 315, § 19,) and not otherwise. Revocation by cancellation or by will, executed as other wills are executed, is provided for, and a will cannot be otherwise revoked (1818, R. L. 1824, c. 45, § 6; 1831, P. L. 272, § 14; 1838, Rev. 315, § 14; 1852, R. S. 314, § 19; 1876, R. S. 576, § 19.) In *Iowa* there could be no parol revocation of a written will (1839, T. L. 476, § 15,) for which was substituted in 1843 (P. L. 668, § 9,) a provision for revocation by change of circumstances, itself omitted in the code (1873, § 2329.) Revocation may be by cancellation or will executed according to Iowa law, and since the code such cancellation must be witnessed by two witnesses (1839, T. L. 476, § 15; 1843, P. L. 668, § 9; 1873, Code, §§ 2329-30.) In *Kansas* revocation must be by cancellation, as in the statute of Victoria or will executed according to Kansas law (1855, T. L., c. 164, § 5; 1859, P. L., c. 131, §§ 12, 13; 1865, P. L., c. 86, § 39; 1868, G. S., c. 117, § 37; ed. 1878, § 6149.) In *Kentucky* revocation of a will may be either by destruction, as in section XX., *supra*, or by a revoking will executed in accordance with the Kentucky statute, or by a writing "declaring an intention to revoke," and executed as a will (1785 and 1797, 1 Litt. Stats. 611, § 3; 1851, R. S., c. 106, § 10; 1873, G. S., c. 113, § 10.) Under the original act a will of personal property could only be revoked in writing

(*m*) Vol. I., pp. *140, *145.

a will, shall have any effect, unless executed as a will.

so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for

(1 Litt., *supra*, § 7.) In *Louisiana* the same formalities are required for revocation as for execution of a will (1825, Code, § 1685; ed. 1870, § 1692.) So in *Maine*, unless by destruction, as in section XX., *supra*, or by change of circumstances (1821, P. L. 137, § 2; 1871, R. S. 563, § 3.) In *Maryland* a written will of personal property can be revoked by parol, if reduced to writing and approved by the testator before his death and proved by three witnesses (1810, P. L., c. 34, § 3; 1860, Code, art. 93, § 303; 1878, Rev. Code 419, § 6.) Other wills can only be revoked as in section XX., *supra* (1860, Code, art. 93, § 302; 1798, c. 101, sub. c. 1, § 4; 1878, Rev. Code 419, § 5.) In *Massachusetts* a written will of personal property could formerly be revoked by parol, if such revocation were reduced to writing and approved by testator, and proved by three witnesses (1692, Acts, &c., Mass. Bay, vol. I., p. 47; 1784, 1 Laws 109, § 6.) But now wills can only be revoked as in section XX., *supra* (1692, Acts, &c., Mass. Bay, vol. I., p. 46; 1859, G. S., c. 92, § 11.) But see section XIX., note 20. In *Michigan* no will can be revoked except by cancellation, as in section XX., or revoking will executed according to Michigan statute (1809, 2 T. L. 13, § 1; 1811, 1 T. L. 160, § 2; 1857, Comp. L., c. 92, § 4330; 1871, Comp. L., c. 154, § 9.) But see section XIX., note 20. Formerly a written will of personal property could be revoked by a parol will reduced to writing and approved by the testator and proved by three witnesses (1809, 2 T. L. 13, § 5.) In *Minnesota* a will can only be revoked as in section XX. (1851, R. S., c. 53, § 10; 1866, G. S., c. 47, § 9); or by change of circumstances, section XIX., note 20. In *Mississippi*, only as in section XX. (1821, Hutch. Code 647, § 15; 1871, Rev. Code, § 2389.) In *Missouri* likewise (1808, 1 T. L. 140, §§ 20, 21; 1814, Id. 405, § 27; 1821, Id. 786, § 3; 1825, R. L. 790, § 3; 1835, R. S. 617, § 5; 1845, R. S. 1078, § 6; 1855, R. S., c. 167, § 5; 1865, G. S., c. 131, § 4; 1879, R. S., § 3963.) In *Nebraska* likewise, or since 1860 by change of circumstances (1855, P. L. 63, § 52; 1856, P. L. 95, § 15; 1860, P. L. 77, § 10; 1866, R. S., c. 14, § 132; 1873, G. S., c. 17, § 132,) but if the destruction of the will be done for the testator by another, such act must formerly have been attested by witnesses like a will (1856, P. L. 95, § 19; and see 1855, P. L. 63, § 53.) In *Nevada* revocation may be as in section XX., *supra*, or by change of circumstances (1862, P. L., c. 61, § 8.) So in *New Hampshire* (1822, P. L. 10, § 7; 1878, G. L., c. 193, § 14.) By the former of these acts a nuncupative will might be revoked by parol, if the words were reduced to writing and read to the testator in the presence of three witnesses, and approved by him. In *New Jersey* wills may be revoked only as in section XX. (1795, Pat. Rev. 190, § 2; 1851, P. L. 218, § 2; 1877, Rev. 1243, § 2, and 1248, § 23.) By the act of 1795, *supra*, which was applicable only to devises of an estate or interest in land, three witnesses were necessary to the execution of a revoking will. This was reduced to two by the act of 1851, *supra*, but the act of 1795 was re-enacted as a revised act in its original form, and now stands with the act of 1851. A written will of personal property may be revoked by parol, if the revoking words are reduced to writing and read to and approved by the testator in the presence of three witnesses (1795, Pat. Rev. 190, § 17; 1877, Rev. 1246, § 14.) In *New York* the revocation of a will in writing must be executed like

the execution of the will; but the will with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.[22]

a will (1787, 1 Greenl. 386, § 3; 1829, 2 R. S. 56, § 42.) Prior to the Revised Statutes of 1829 a will of personal property might have been revoked by words, if they were reduced to writing and read to and approved by the testator in the presence of three witnesses (1787, 1 Greenl. 391, § 18.) The provision for destruction or cancellation of a will, and for revocation by another will, are the same as those of the English statute (1787, 1 Greenl. 387, § 3; 1829, 2 R. S. 64; 6th ed., vol. III., p. 63, § 40.) In *North Carolina* all devises of real property, and by the revised code, all written wills can only be revoked as in section XX., *supra*, or by a holograph will proved by three witnesses (1819, P. L., c. 1004, §§ 1, 2; Rev. Code, c. 119, § 22; 1873, Batt. Rev., c. 119, § 41.) By the act of 1784 (c. 204, § 13,) a written will of personal property might have been revoked by parol, if the revoking words were reduced to writing, and read to and approved by the testator, and proved by two witnesses. In *Ohio*, since 1808, a will may be revoked by cancellation as in section XX., or by a will or writing executed as wills are required to be executed in Ohio (1808, 6 L. 64, § 3; 1840, 38 L. 120, § 41; 1852, 50 L. 297, § 39; 1878, 75 L. 838, § 41; 1880, Rev., § 5953.) So in *Oregon* (1850, G. S. 274, § 6; 1855, P. L. 384, § 6); and *Pennsylvania* (1833, P. L. 249, § 13; Purd. Dig. 1872, p. 1474, § 16); and *Rhode Island* (1857, R. S. 356, § 5; 1872, G. S. 374, § 6); and *South Carolina*, as regards real property (1789, 5 Stats. at Large 109, § 3; 1873, R. S. 442, § 7.) By the act of 1789 (§ 6) a nuncupative will might be revoked by parol, if the words were reduced to writing, and read to and approved by the testator and proved by three witnesses. In *Tennessee* this latter provision, copied from the act of 29 Car. II., has been in force since 1784 (P. L., c. 22, § 13; 1871, Comp. S., § 2167.) And in the absence of statute, it has been held that no will can be revoked by parol, except as aforesaid, Allen *v.* Huff, 1 Yerg. 404; but that a will may be revoked by cancellation, Smiley *v.* Gambrill, 3 Head 164; or even by a direction to destroy, not carried out, Ford *v.* Ford, 7 Humph. 92. In *Texas* a will may be revoked by cancellation as in section XX., or by a subsequent will or writing executed according to the statutory requirements for wills (1840, P. L. 167, § 3; 1879, R. S., § 4861,) and this applies to wills of personal property as well (1840, *supra*, § 8.) In *Vermont* likewise (1797, Dig. L. 119, §§ 1, 5; 1851, Comp. S. 327, § 7; 1862, G. S., c. 49, § 7.) And in *Virginia*, and since 1873, the revoking will must express the intention to revoke (1748, 5 Stats. at Large 456, § 8; 1785, 12 Id., c. 61, § 3; 1792, 1 Id. (N. S.) 88, § 3; 1819, Rev. Code 376; 1873, Code 910, § 8.) The statute of 1748 (5 Stats. at Large 457, § 12,) also contained a provision for revoking written wills of personal property by parol, if reduced to writing and read to and approved by the testator, and proved by two witnesses. This was done away in 1785 (*supra*, § 7,) and in 1840 (P. L. 50) the distinction be-

22. In *California* a partial obliteration is sufficient, but if the purpose is to effect a new disposition of property, it must be executed like a will (1872, Code, § 6294.)

RIVIVAL OF REVOKED WILL.

No will revoked to be revived otherwise than by re-execution, or a codicil to revive it.

XXII. (*n*) And be it further enacted, That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.[23]

REVOCATION—SUBSEQUENT CONVEYANCE.

A devise not to be rendered inoperative by any subsequent conveyance or act.

XXIII. (*o*) And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.[24]

tween execution of wills of realty and of personalty was abolished. In *West Virginia* the law as to forms of revocation is the same as that of Virginia (1868, Code, c. 77, §§ 6, 7.) In *Wisconsin* a devise of land can be revoked only as in section XX. (1838. T. L. 112, § 22; 1849, R. S., c. 66, § 10; 1878, R. S., § 2290.) By the act of 1838 (T L. 302, § 27,) a written will of personal property could only be revoked by parol, if the words were reduced to writing and read to and approved by the testator in the presence of three witnesses.

(*n*) Vol. I., pp. *145, *191.

23. In *Alabama* the revocation of a will does not revive an earlier will, unless such intention appear in the instrument of revocation, or the former will be republished (Code 1852, § 1614; 1876, § 2297.) So in *Arkansas*, as to the effect of revocation (1847, R. S., c. 170, § 15; 1873, R. S., § 5774); *California* (1850, P. L. 178, c. 72, § 11; 1872, Code, § 6298); *District of Columbia* (1857, Rev. Code, c. 52, § 17,) and a will once revoked can be revived only by re-execution or by a properly executed codicil; *Georgia* (1873, Code, § 2471); in this state, however, a

(*o*) Vol. I., pp. *162, *167.

24. In *Alabama* no revocation of a will is effected by a contract for sale of the property devised, where part of the purchase money remains unpaid, unless such intention clearly appears by the contract or other writing, and the devisee of the land takes subject to the contract, and is entitled to the purchase money (Code 1852, § 1602; 1876, § 2287.) Nor is a

*WILL SPEAKS, FROM WHAT PERIOD.

XXIV. (*p*) And be it further enacted, That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had

A will shall be construed to

will may be republished by parol in the presence of the original witnesses (§ 2478); *Indiana* (1852, R. S. 314, § 19; 1876, R. S. 576, § 19); *Kansas* (1855, T. L., c. 164, § 13; 1865, P. L., c. 164, § 40; 1868, G. S., c. 117, § 38; ed. 1878, § 6150); *Kentucky* (1851, R. S., c. 106, § 11; 1873, G. S., c. 113, § 11); *Missouri* (1845, R. S. 1078, § 14; 1855, R. S., c. 167, § 13; 1865, G. S., c. 131, § 12; 1879, R. S., § 3968.) So in *Nebraska* until 1860 (1856, P. L. 96, § 27.) So in *Nevada* (1862, P. L., c. 61, § 9); *Ohio* (1840, 38 L. 120, § 42; 1852, 50 L. 297, § 40; 1878, 75 L. 838, § 48; 1880, Rev., § 5960); *Oregon* (1850, G. S. 274, § 14; 1855, P. L. 384, § 14); *Virginia* (1873, Code 911, § 9); *West Virginia* (1868, Code, c. 77, § 8.)

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will revoked by a subsequent charge or encumbrance upon the property bequeathed or devised, unless such intention appear in the will or in the writing creating the encumbrance (Code 1852, § 1603; 1876, § 2288); nor by a sale of real property devised in which a new estate is afterward acquired, unless such intention appear in the will or instrument of transfer (Code 1852, § 1604; 1876, § 2289.) In *Arkansas* no revocation of a will is effected by a contract for sale of, or a charge or encumbrance on, property devised or bequeathed, but the devisee takes subject thereto (1847, R. S., c. 170, §§ 9, 10; 1873, R. S., §§ 5768, 5769.) So in *California* (1850, P. L. 178, c. 72, §§ 14, 15; 1872, Code, §§ 6301–2); nor is a conveyance a revocation, unless it disposes of testator's entire interest (Code, § 6303.) In the *District of Columbia* a subsequent conveyance of property given by will only revokes the will so far as it prevents its operation (1857, Rev. Code, c. 52, § 16.) In *Georgia* an exchange of property devised for other property effects a substitution of the gift, and not a revocation of the devise (1873, Code, § 2464.) In *Indiana* neither contract for sale, conveyance nor encumbrance of property given by will revokes the will, except so far as it prevents its operation by destroying testator's interest (1852, R. S. 311, §§ 6–9; 1876, R. S. 572, § 6–9.) So in *Kansas* (1855, T. L., c. 164, §§ 8, 9; 1865, P. L., c. 86, §§ 33–35; 1868, G. S., c. 117, §§ 31–33; ed. 1878, §§ 6143-5.) And *Kentucky* (1851, R. S., c. 106, § 12; 1873, G. S., c. 113, § 12.) In *Missouri* neither contract for sale, nor charge, nor encumbrance is a revocation, except so far as it renders the will ineffectual (1845, R. S. 1078, §§ 9, 10; 1855, R. S., c. 167, §§ 8, 9; 1865, G. S., c. 131, §§ 7, 8; 1879, R. S., §§ 3966–7); In *Nebraska* the act of 1856 (P. L. 95, §§ 22–24,) was to the same effect, including conveyance of property devised. This act was repealed in 1860. The law of *Nevada* is like that of Missouri, *supra*, (1862, P. L., c. 61, §§ 12, 13.) In *New York*, by the Revised Statutes of 1829 (2 R. S. 56, §§ 45–47,) a contract to sell, or a charge or encumbrance upon the property devised, is no revocation, but a conveyance altering the testator's interest is, unless a contrary intention be expressed. In *North Carolina* no revocation of a will is effected by subsequent conveyance of

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(*p*) Vol. I., pp. *203, *326, *425, *650, *672, *687; O'Toole *v.* Brown, 3 Ell. & Bl. 572.

speak from the death of the testator.

been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.[25]

LAPSED AND VOID DEVISES.

A residuary devise shall include estates comprised in lapsed and void devises.

XXV. (*q*) And be it further enacted, That, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.[26]

the property devised (Rev. Code, c. 119, § 25; 1873, Batt. Rev., c. 119, § 44.) Nor in *Ohio* by contract for sale, charge, or encumbrance, or conveyance, unless intention to revoke is express (1840, 38 L. 120, §§ 35–37; 1852, 50 L. 297, §§ 33–35; 1879, 75 L. 838, §§ 42–44; 1880, Rev., §§ 5954–6.) In *Oregon* neither contract for sale nor encumbrance is a revocation (1850, G. S. 274, §§ 9, 10; 1855, P. L. 384, §§ 9, 10.) Nor in *Virginia* (1873, Code 911, § 10.) Nor in *West Virginia* (1868, Code, c. 77, § 9.) In *Tennessee*, however, in the absence of statute, sale of property devised or other alteration of the testator's estate is a revocation *pro tanto*, Donohoo *v.* Lea, 1 Swan 119; Young *v.* Crowder, 2 Sneed 156; Blair *v.* Snodgrass, 1 Id. 1.

25. This section has been enacted in: *Georgia* (1858, Code, § 2363; 1873, Code, § 2398); *Kentucky* (1851, R. S., c. 106, § 16; 1873, G. S., c. 113; § 16); *Michigan* (1857, Comp. L., c. 92, § 4; 1871, Comp. L., c. 154, § 4325); *New Jersey* (1850, P. L. 280, § 2, repealed; 1851, P. L. 218); *North Carolina* (1873, Batt. Rev., c. 119, § 6); *Pennsylvania* (1879, P. L. 88); *Tennessee* (1852, P. L. 260, § 2; 1858, Code, § 2195; 1871, Comp. S., § 2195); *Virginia* (1873, Code, 911, § 11); *West Virginia* (1868, Code, c. 77, § 10.) And this is so in *California* of words relating to death or survivorship, or to a class of persons (1872 Code, §§ 6336–7.) In *Louisiana*, if no time be expressed, the will is construed to speak from its date (1825, Code, § 1715; ed. 1870, § 1722.)

(*q*) Vol. I., pp. *202, *351, *643, *650.

26. In *Alabama* all property undisposed of by will goes as in case of intestacy (1806, Toulm. Dig. 883, § 8; 1852, Code, § 1596; 1876, Code, § 2281.) A devise to a person or corporation incapable by law of taking the same goes to the next of kin, the residuary devisee, the husband or wife, or the state, in the order named (1852, Code, § 1591; 1876, Code, § 2276.) In *California* a residuary legacy "embraces only that which remains after all the bequests of the will are discharged" (1872, Code, § 6357.) In *Colorado* a gift to a child or grandchild, lapsing by death without issue before testator's death, goes as intestate property (1861, P. L. 403, § 15; 1867, R. S. 644, § 9; 1877, R. S., § 2796.) In the *District of Columbia* lapsed and void devises go to the residuary devisee (1857, Rev. Code, c. 52, § 19.) In *Illinois* a lapsed gift to a child or grandchild, dying without issue before testator, formerly went as in case of intestacy (1829, Rev. Code, 196, § 13; 1833, P. L. 616; 1845, R. S. 539, § 14.) There is, however, no lapse if such child or grand-

GENERAL DEVISE—COPYHOLDS AND LEASEHOLDS.

XXVI. (r) And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold and leasehold estates of the testator, or his customary, copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will. 27

A general devise of lands shall include copyhold and leasehold as well as freehold lands.

GENERAL DEVISE—APPOINTMENT.

XXVII. (s) And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, (as the case may be,) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner, a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to

A general gift shall include estates over which the testator has a general power of appointment.

child have left issue surviving the testator, as to which see note 31, *infra*. In *Kentucky* void gifts of real or personal property do not go to the residuary legatee, but as in case of intestacy (1851, R. S., c. 106, § 20; 1873, G. S., c. 113, § 20.) In *Minnesota* estate "not disposed of" by will goes as in case of intestacy (1878, R. S. 567, § 1.) In *Mississippi* charitable devises, which are declared void, go to the heir as though there were no will (1871, Rev. Code, § 2440.) In *North Carolina* lapsed and void devises go to the residuary legatee, unless a contrary intention appear (1873, Batt. Rev., c. 119, § 7.) So in *Pennsylvania* since 1879 (P. L. 88.) So in *Virginia* (1873, Code, 911, § 14; 1819, Rev. Code 376.) So in *West Virginia* (1868, Code, c. 77, § 13.)

(r) Vol. I., p. *673.

27. In *Kentucky* a general devise includes leaseholds (1851, R. S., c. 106, § 21; 1873, G. S., c. 113, § 21.) So in *Virginia* (1873, Code 912, § 15.) So in *West Virginia* (1868, Code, c. 77, § 14.)

(s) Vol. I., pp. *336, *680; In re Clark's Estate, 14 Ch. D. 422; In re Van Hagan, 16 Ch. D. 18.

include any personal estate, or any personal estate to which such description shall extend, (as the case may be,) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.[28]

*FEE SIMPLE WITHOUT WORDS OF LIMITATION.

A devise without any words of limitation to pass the fee.

XXVIII. (*t*) And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.[29].

28. This section is enacted substantially in the *District of Columbia* (1857, Rev. Code, c. 52, § 20.) So in *California*, a gift of all testator's real or personal property (1872, Code, § 6330); also *Kentucky* (1851, R. S., c. 106, § 22; 1873, G. S., c. 113, § 22); *Michigan* (1871, Comp. L., c. 149, § 53); *Minnesota* (1878, R. S. 559, § 52); *North Carolina* (1873, Batt. Rev., c. 119, § 8); *Pennsylvania* (1879, P. L. 88); *Virginia* (1873, Code 912, § 16); *West Virginia* (1868, Code, c. 77, § 15); *Wisconsin* (1849, R. S. 325, § 53; 1878, R. S., § 2151.) In *Nebraska* it passes all the estate which testator "could lawfully devise" (1873, G. S., c. 17, § 124.) In *New York* "every instrument * * * conveying an estate, or creating a charge which such (person) would have no right to convey or create unless by virtue of his power shall be deemed a valid execution of the power although such power be not recited or referred to" (1 R. S. 737, § 124; 6th ed., vol. II., p. 1118, § 145.) And a general devise of all testator's real or personal property executes a power unless a contrary intention appear (Id., § 147.)

(*t*) Vol. I., p. *560; vol. II., pp. *102, *286, *439.

29. In *Alabama* a general devise passes testator's entire estate (1852, Code, § 1593; 1876, Code, § 2178.) In *Arkansas* such words are not necessary to pass a fee simple by deed (1874, Dig. Stats., §§ 831, 836.) So in *California* as to devises, unless a contrary intention appear in the will (1850, P. L., c. 72, § 21; 1872, Code, § 6311.) So in *Colorado* (1877, G. L. 134, § 7.) In *Delaware* a devise without words of limitation passes a fee simple (1849, P. L. 325; 1852, Rev. Code, 296, § 24; ed. 1874, p. 508, § 1666.) So in *Georgia* (1873, Code, § 2248; 1821, P. L. 169.) So in *Illinois* (1880, Rev. 268, § 13.) In *Iowa* a general devise passes testator's entire estate, unless contrary intention appear (1843, P. L. 666, § 2.) In *Kansas* a devise without words of limitation passes a fee simple, unless a contrary intention appear (1855, T. L., c. 164, § 45.) This was changed in 1865 so as to make a general devise carry testator's entire estate, unless a contrary intention appear (1865, P. L., c. 86, § 55; 1868, G. S., c. 117, § 54; ed. 1878, § 6166.) In *Kentucky* a devise without words of limitation passes a fee simple (1873, G. S. 585, § 7.) In *Maine* a general devise passes testator's whole estate, unless a contrary intention appear (1871, R. S. 563, § 16.) In *Maryland* a fee simple passes by devise without words of inheritance, unless a contrary intention appear (1825,

WORDS IMPORTING FAILURE OF ISSUE.

XXIX. (*u*) And be it further enacted, That in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without

Words importing failure of issue to mean issue living at the death.

P. L., c. 119; 1860, Code, art. 93, § 305; Rev. Code 1878, art. 49, p. 419, § 8.) In *Massachusetts* since 1836 a general devise passes testator's whole estate, unless a contrary intention appear (1829, G. S., c. 92, § 5.) So in *Michigan* (1857, Comp. L., c. 92, § 2; 1871, Comp. L., c. 154, § 4323.) So in *Minnesota* (1851, R. S., c. 53, § 2; 1866, G. S., c. 47, § 2.) In *Missouri* a fee simple passes by general devise without words of inheritance (1825, R. L. 790, § 19; 1835, R. S. 617, § 29; 1845, R. S. 1078, § 47; 1855, R. S., c. 167, § 46; 1865, G. S., c. 131, § 45; 1879, R. S., § 4004.) In *Nebraska* a general devise passes testator's whole estate (1860, P. L. 77, § 2; 1866, R. S., c. 14, § 124; 1873, G. S., c. 17, § 124.) So in *Nevada* (1862, P. L. 60, § 19.) So in *New Hampshire* (1819, P. L. 222; 1878, G. L., c. 193, § 4.) In *New Jersey* a fee simple passes without words of inheritance, unless a contrary intention appear (1784, Pat. Rev. 53; 1877, Rev. 300, § 13.) So in *New York*, and testator's whole estate passes in like manner, unless a contrary intention appear (1829, 1 R. S. 748; 6th ed., vol. II., p. 1130, § 1.) In *North Carolina* a fee simple passes without words of inheritance, unless a contrary intention appear (1784, P. L., c. 204, § 12; 1873, Bat. Rev., c. 119, § 45.) In *Ohio* likewise (1834, P. L. 41; 1840, 38 L. 120, § 49; 1852, 50 L. 279, § 55; 1878, 75 L. 838, § 58; 1880, Rev., § 5970.) So in *Oregon* (1850, G. S. 274, § 47; 1855, P. L. 384, § 47.) So in *Pennsylvania* testator's whole estate passes without words of limitation, unless a contrary intention appear (1833, P. L. 249, § 9; 1872, Purd. Dig. 1474, § 10.) So in *Rhode Island* (1872, G. S. 374, § 5.) So in *South Carolina* a fee passes without words of inheritance, unless a contrary intention appear (1824, 6 Stats. 337.) So in *Tennessee* (1784, P. L., c. 22, § 12; 1851, P. L., c. 33, § 1; 1871, Comp. S., § 2006), and testator's whole estate passes by a general devise, unless a contrary intention appear (1858, Code, § 2164; 1871, C. S., § 2164.) So in *Texas* testator's whole estate passes by a general devise, unless a contrary intention appear (1851, Comp. S. 327, § 3; 1862, G. S., c. 49, § 3.) So in *Virginia* a fee simple now passes without words of inheritance (1873, Code 889; 1819, Rev. Code 369; but for earlier law adjudging such devise to be a life estate, see Broomfield *v.* Crumpe in 1655, 1 Va. Laws 405.) In *Wisconsin* testator's whole estate passes unless a contrary intention appear (1849, R. S. 353, § 2; 1878, R. S., § 2278.)

(*u*) Vol. I., p. *560; vol. II., pp. *493, *532, *555, n.

any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this act shall not extend to cases where such words as aforesaid import, if no issue described in a preceding gift shall be born, or, if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.[30]

Proviso.

ESTATE OF TRUSTEES.

No devise to trustees or executors, except for a term or a presentation to a church shall pass a chattel interest.

XXX. (*x*) And be it further enacted, That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

ESTATE OF TRUSTEES.

Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life to take the fee.

XXXI. (*y*) And be it further enacted, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest *in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real

30. This has been enacted substantially in *Alabama* (1876, Code, § 2181); *California* (1872, Code, § 6336); *Georgia* (1854, P. L 72; 1873, Code, § 2249); *Kentucky* (1877, R. S. 586, § 9); *Maryland* (1862, P. L., c. 161; 1878, Rev. Code 420, § 9); *Michigan* (1871, Comp. L., c. 147, § 22); *Minnesota* (1873, Stats. at Large 613); *Mississippi* (1857, P. L. 307); *Missouri* (1872, Wagn. Stats., c. 140, § 5); *New Jersey* (1877, Rev. 1248, § 25; 1851, P. L. 218); *New York* (1829, 1 R. S. 724; 6th ed., vol. II., p. 1102, § 22); *North Carolina* (1873, Batt. Rev., c. 42, § 3); *South Carolina* (1873, R. S., c. 86, § 10); *Tennessee* (1858, Code, § 2009; 1871, Comp. S., § 2009); *Virginia* (1873, Code, c. 112, § 10.)

(*x*) Vol. II., p. *320.

(*y*) Vol. II., p. *320.

estate, and not an estate determinable when the purposes of the trust shall be satisfied.

LAPSE OF ESTATE TAIL.

Devises of estates tail shall not lapse, when.

XXXII. (z) And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail or an estate *in quasi* entail shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator unless a contrary intention shall appear by the will.[31]

LAPSE—CHILDREN OF ISSUE DYING IN TESTATOR'S LIFETIME.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

XXXIII. (a) And be it further enacted, That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.[32]

(z) Vol. I., p. *352; Vol. II., p. *356.

31. For change of estate tail into fee simple in the United States, see *ante* p. 89.

(a) Vol. I., p. *352.

32. In *Alabama* a legacy to a "child or descendant" of the testator does not lapse by reason of his death before the testator, if he leave issue surviving the testator, but goes to such issue (1852, Code, § 1605; 1876, Code, § 2290.) So in *Arkansas* (1847, R. S., c. 170, § 14; 1873, R. S., § 5773.) In *California* similar provision is made as to gifts to a "child or other relation" (1850, P. L., c. 72, § 20; 1872, Code, § 6310.) So in *Colorado* as to gifts to a "child or grandchild" (1861, P. L. 403, § 15; 1867, R. S. 644, § 9; 1877, R. S., § 2796.) So in the *District of Columbia* as to gift to any legatee or devisee (1857, Rev. Code, c. 52, § 18.) So in *Connecticut* as to gifts to "child or grandchild," since 1801 (1875, G. S. 370, § 5.) So in *Georgia* as to gift to child of testator (1836, P. L. 348; 1858, Code, § 2426; 1873, Code, § 2462.) So in *Illinois* as to gift to "child or grandchild" (1833, P. L. 616; 1829, Rev. Code 196, § 13; 1845, R. S. 539, § 14.) So in *Indiana* as to gifts to "descendants" (1876, 2 R. S. 573, § 13.) So in *Iowa* as to gifts to any legatee or devisee (1880, Code, § 2337,) dying before testator,

WHEN ACT OPERATES.

Act not to extend to wills made before 1838, nor to estates *pur autre vie* of persons who die before 1838.

XXXIV. And be it further enacted, That this act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will re-executed (*b*) or republished, or revived by any codocil, shall, for the purposes of this act, be deemed to have been made at the time at which the same shall be so re-executed, republished or revived; and that this act

whether he leave issue or not, his "heirs" taking unless a contrary intention appear. So in *Kansas* as to gifts to a "child or other relation" leaving issue surviving testator (1855, T. L., c. 164, § 12; 1859, P. L., c. 131, § 11; 1862, C. L., c. 215; 1865, P. L., c. 86, § 56; 1868, G. S., c. 117, § 55; ed. 1878, § 6167.) By the acts of 1859 and 1864, this was extended to all legatees and devisees, but restricted again in 1865. So in *Kentucky* as to gifts to any legatee or devisee (1851, R. S., c. 106, § 18; 1873, G. S., c. 103, § 18.) So in *Maine* as to gift to child (1821, P. L. 137, § 15; 1871, R. S. 563, §§ 9, 10, this last section extending the act to any relative of testator.) So in *Maryland* as to gift to any legatee or devisee (1810, P. L., c. 34, § 4; 1832, P. L., c. 295; 1860, Code, art. 93, § 304; 1878, Rev. Code, art. 49, p. 419, § 7.) So in *Massachusetts* as to gift to "child or other relation" (1859, G. S., c. 92, § 28.) So in *Michigan* (1871, Comp. L., c. 154, § 28.) So in *Minnesota* as to gift to a "child or other relation" (1851, R. S., c. 53, § 29; 1866, G. S., c. 47, § 25.) So in *Mississippi* as to gift to "child or descendant" (1821, Hutch. Code 647, § 17; 1871, Rev. Code, § 2391.) So in *Missouri* as to gift to a "child, grandchild or other relation" (1825, R. L. 790, § 21; 1835, R. S. 617, § 31; 1845, R. S. 1078, § 13; 1855, R. S., c. 167, § 12; 1865, G. S., c. 131, § 11; 1879, R. S., § 3971.) So in *Nebraska* restricting to a "child, grandchild or other relation," leaving issue, what by acts of 1855 and 1856 applied to all devisees leaving heirs (1855, T. L. 63, § 51; 1856, T. L., c. 37, §§ 16, 26; 1860, P. L., c. 5, § 29; 1866, R. S., c. 14, § 15; 1873, G. S., c. 17, § 151.) So in *Nevada* as to gift to "child or other relation" leaving descendants (1862, P. L. 60, § 18.) So in *New Hampshire* as to any legatee or devisee leaving descendants (1822, P. L. 10, § 5; 1878, G. L., c. 193, § 12.) So in *New Jersey* as to gifts to a "child or other descendant" (1824, P. L. 174; 1877, R. S. 1246, § 20.) So in *New York* as to a gift to a child (1829, 2 R. S. 56, § 52.) So in *North Carolina* (1816, P. L., c. 17; 1821, R. S., c. 915; 1873, Batt. Rev., c. 45, § 111,) as to gift to a "child or other issue." So in *Ohio* as to gift to a "child or other relation" (1840, 38 L. 120, § 50; 1852, 50 L. 297, § 56.) This was extended in 1866 to children who had died before the will was made, and it was further provided that if the gift were a residuary one, and one of the residuary legatees, being such child or relation, died without issue before testator's death, his share should go to the other residuary legatees, unless a contrary intention appeared (1866, 63 L. 47; 1878, 75 L. 838, § 59; 1880, Rev., § 5971.) So in *Oregon* as to gift to "child, grandchild or other relation" (1850, G. S. 274, § 13; 1855, P. L. 384, § 13.) So in *Pennsylvania* as to gift to "descendant," or since 1844, brother or sister, or children of de-

(*b*) Vol. I., p. *203.

shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

SCOTLAND.

XXXV. And be it further enacted, That this act shall not extend to Scotland.

Act not to extend to Scotland.

ceased brother or sister (1833, P. L. 249, § 12; 1844, P. L. 565; 1872, Purd. Dig. 1474, §§ 14, 15.) So in *Rhode Island* as to a gift to a "child, grandchild or other person" (1857, R. S. 356, § 12; 1872, G. S. 374, § 12.) So in *South Carolina* as to gift to a "child," unless there have been advancements equal to his share (1789, 5 Stats. at Large 106, § 9; 1873, R. S. 442, § 13. So in *Tennessee* as to gifts to any "legatee or devisee" leaving issue (1842, P. L. 193, § 3; 1852, P. L. 260, § 3; 1858, Code, § 2196; 1871, C. S., § 2196.) So in *Texas* as to gift to "descendant" (1840, P. L. 167, § 5; 1879, R. S., § 4871.) So in *Vermont* as to gift to "child or other relation" (1851, Comp. S. 327, § 28; 1862, G. S., c. 49, § 28.) So in *Virginia* as to gift to any legatee or devisee (1819, Rev. Code 376; 1873, Code 911, § 13.) So in *West Virginia* (1868, Code, c. 77, § 12.) So in *Wisconsin* as to gift to a "child or other relation" (1849, R. S., c. 66, § 29; 1878, R. S., § 2289.) And see vol. I., p. 638, n

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